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TREATISE

OF THE

TRUE and ANCIENT

JURISDICTION

OF THE

Houſe of Peers.

By Sir *ROBERT ATKYNS*,
Knight of the BATH.

State ſuper Semitas antiquas.

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SEP 19 1916

To the Honourable

The Knights, Citizens, and Burgeſſes of the Houſe *of* Commons *in Parliament Aſſembled.*

The Humble Petition of Sir Robert Atkyns *Knight of the Bath,*

SHEWETH,

THAT your Petitioner, in the ſeveral Publick Employments he hath undergone, hath had more than ordinary occaſion of obſerving the encreaſing Juriſdiction of the Courts of Equity in this Kingdom, and how the Common-Law (the Birthright of every Engliſhman) hath been, and ſtill is every day more and more invaded by it.

He hath taken the pains to collect many of thoſe continual complaints from time to time made by the Commons of England in Parliament, againſt the Exerciſe of that New Juriſdiction in the very beginning of it.

And your Petitioner hath great reaſon alſo, to take notice of the Exerciſe of the Juriſdiction of Appeals from the Proceedings of thoſe Courts: And humbly preſents this Honourable Houſe with what he hath collected, in order to your Service therein.

Your Petitioner craves leave to make uſe of that freedom which belongs to every Engliſhman, to tender you a Complaint againſt ſo publick and ſpreading a Grievance.

He doth not Appeal, nor complain of any thing that meerly concerns himſelf: He only ſubjoins a Caſe wherein himſelf was a Party, meerly as an Inſtance of the large Exerciſe of a power againſt

againſt the known and fundamental Rules of the Common-Law, as he conceives.

That Caſe of your Petitioner happened very lately in the Chancery; But it is generally known in the Courts of Weſtminſter-Hall, *That as your Petitioner had occaſion, he hath for many years frequently and publickly in his Station enveigh'd againſt the Encroachments of Courts of Equity, and that late courſe of Appeals.*

But on the behalf of the whole Kingdom he humbly offers his Service, and lays before You what he hath obſerved and collected upon this Subject, after near Threeſcore years Experience.

And ſubmits All to your Wiſdom, to proceed in providing Juſt Remedies.

And your Petitioner ſhall ever Pray, *&c.*

Robert Atkyns.

OF

OF THE

Supreme Jurisdiction

IN THE

KINGDOM

OF

ENGLAND.

THE House of Lords have a very Ancient and Transcendent Jurisdiction; but it is not Absolute nor Arbitrary in the Exercise of it, nor Universal; and in all Cases it is a Power Limited by Law, and must be Exercis'd according to the known Rules of Law.

And though the Peers are very Great and Honourable, yet they are but Men, and not Infallible; and therefore a Writ of Error lies upon their Judgments: And the Law allows that liberty to the meanest Subject, to demur to the Jurisdiction of any Court whatsoever, even that of the House of Lords.

Let us Enquire into their Jurisdiction, when it began, and in what Cases they have a Right to it.

An Eminent Author, suppos'd to be the Late Lord *Hollis*, upon occasion of the great Cause between *Skinner* and the *East-India-Company*, (so much disputed between the Two Houses of Parliament) hath in Print Asserted,

That the House of Peers hath their Right of Judicature from the beginning of the Nation, *Page* 134.

He affirms it is a Power Lodged in them by the very Frame and Constitution of the Government.

As to the Extent of their Juriſdiction, *Page* 213. he affirms, That they have an undoubted Right to an Univerſal and Unlimited Power of taking Conuſance of all manner of Cauſes of what nature ſoever; and of Judging and Determining of them, if no particular Law do otherwiſe diſpoſe of them.

Nec Metas rerum, nec tempora ponit.

The firſt of theſe ſeems to Entrench very far upon the Regal Power. He not only makes their Power equal in time to it, owning no Derivation from it, but in effect Claims a Co-ordination with it: But the Claim of ſuch an Independent and Original Power, ſounds like that which is taken to be a peculiar of the Supreme Power, as to the Adminiſtration of it, *viz.* In all Cauſes, and over all Perſons, *&c.* Nay, he holds that the Peerage ſets bounds both to Power and Liberty, *Page* 71. as this Author maintains it. It may eaſily be underſtood (by what follows) what is meant there by (Power) *viz.* The Regal Adminiſtration of it. Whereas the Common-Law of *England*, and all the Authors and Writers of it, do with one Conſent acknowledge, Juriſdictions within this Realm are deriv'd from the Crown. And that no Court hath an Abſolute and Unlimited Power, ſave the Supreme Court of the Nation, conſiſting of the King, Lords, and Commons Aſſembled in Parliament, and in them indeed is the True Supreme Power under God. But that, according to the different nature of Cauſes, ſome are diſtributed into one Court, and ſome into another: But not any one Court hath Juriſdiction in all Cauſes, ſave that of the Parliament.

And that all Courts muſt proceed by ſome certain known Rules, that is, the Courts of the Common-Law, *Secundum legem & conſuetudinem Angliæ*; And Courts of Equity, according to the ancient and conſtant Precedents, and Uſage.

But this Court of Peers (for I confine my ſelf ſtill to what is aſſerted by this Noble Author) doth wholly exclude the King, and ingroſs all to themſelves? No, by no means. He allows the King a ſingle Voice among them, *Page* 145. as a Chief Juſtice in another Court, whoſe Voice or Opinion hath no more force than that of a Puiſny Judge. No, not ſo much as a Caſting-Voice, where they are *equally divided.*

I ſhall offer to Conſideration upon what grounds and proofs this Noble Author doth Entitle the Houſe of Peers to this Unlimited Juriſdiction.

He

He hath been led into theſe Opinions, I fear, by ſome late over-zealous and injudicious Writers, who, out of a too fond and forward Zeal to depreſs the Houſe of Commons, in the late Exorbitant Power which they took upon them in the late Times, in order (I ſay) to the decrying of their Uſurped Power; thoſe Writers thought they could never ſufficiently Exalt the Power of the Lords, to over-ballance that of the Commons.

And it may perhaps be uſeful (by the way) to take notice of the ſtrange Revolution that in the late Times happened to the Government of this Nation.

1. Our Kings began firſt to ſtrain Prerogative too high upon the Subject.

2. Both the Houſes of Parliament thereupon join'd together in Uſurping upon the Regal Power.

3. After ſome ſhort time the late Houſe of Commons, by the help of their Army, laid aſide the Houſe of Lords.

(Sic cum ſole, perit Syderibus decor.)

4. After ſome time again a leſſer part of the Houſe of Commons exclude the greater part.

5. And theſe their own Army over-top, as being but the Fragment of that Houſe.

1. —— —— *Sic Medus ademit*
2. *Aſſyrio: Medóq; tulit moderamina, Perſes;*
3. *Perſen ſubjecit Macedo, Ceſſurus & Ipſe*
4. *Romano.*

Theſe Modern Writers, who are ſuch earneſt Advocates for the Houſe of Peers, aſcribe to the Lords all that vaſt Power and Juriſdiction, which they read in our Ancient Hiſtories to be exerciſed by the National Aſſemblies in the Times of the old *Britiſh*, *Saxon*, *Daniſh*, and *Norman* Kings.

Thus Writes Mr. *William Pryn*, in his Plea for the Lords and Houſe of Peers, *Page* 164. That the Houſe of Peers had this Sovereign Juriſdiction veſted in it both in the Times of the *Britiſh*, *Saxon*, *Daniſh*, and *Norman* Kings; and other Modern Writers Chyme in with him.

Whereas it is moſt Evident by our more Ancient and moſt Judicious Authors, and Antiquaries, That the great Aſſemblies which were convened in Ancient Times here in *England*, were quite of another Conſtitution and Complexion from the now Two Houſes of Parliament, and had no reſemblance to them.

It was in thoſe Ancient Times but one great and numerous Aſſembly that met: Not diſtinguiſh'd either by thoſe ſeveral Terms of Lords and Commons; or by Two Houſes, the Upper and the Lower, nor by any other dividing Titles.

Thoſe great Aſſemblies had under our ſeveral Kings, and together with them, the whole Legiſlative, and Judicial Power, with little diſtinction to be found in the Exerciſe of thoſe Two mighty Powers. The Members of them were not qualified neither by any Title of Honour, (though there might be honorary Titles in thoſe Times) but they were qualified and entitled to their Power by their Poſſeſſions and Tenures, and ſome few by certain great Offices.

This great Aſſembly could not properly be called The Repreſentative of the Nation, (for they came not all to theſe Aſſemblies as choſen by the People) but moſt of them came thither in their own Perſonal inherent Right, and might more juſtly be call'd, the Principals of the Nation, and look'd upon as the true Owners and Proprietors of the Nation, accounting the Land-Intereſt to be the main, and the true, and ſtable Intereſt, and might therefore truly be termed, The Nation it ſelf Aſſembled, or the People Aſſembled.

It was the Land-Intereſt then that gave both Honour and Power. *Dat Cenſus Honores*; yet it cannot be denied, but that the Ancient Boroughs did Elect their Repreſentatives, even in the moſt Ancient Times, who were at firſt a ſmall part of theſe great Aſſemblies; though now much more numerous, and weigh down the ballance; and this is proved to have been long before the Time of King *Henry* the *Third*, though thoſe late Writers date it from that time only.

It would be folly to undertake to give any clear or large account of the Supreme Judicatures that were in the Times of the Ancient *Brittons*, *Saxons*, or *Danes*, which many of our late Writers pretend to do.

For *Tacitus* in the Life of *Agricola* tells us of the old *Brittons*, that at the time of the coming of the *Romans* into this Land, they did not ſo much as *in Commune Conſulere*; that is, they had no Common-Council, nor did they meet together to Conſult how to repel their common danger; but were divided into a multitude of Feuds and Factions, under their *Reguli* or petty Princes.

Rarus duabus tribuſve Civitatibus ad propulſandum Commune periculum Conventus.

After

After the *Britons* were wholly ſubdued by the *Romans*, they receiv'd Law and Magiſtracy from their Conquerors. *Nec legibus ſuis patriis uti permiſſi ſunt* (though it is impli'd, that they had Laws of their own) *Sed Magiſtratus à populo Romano cum Imperio & ſecuribus miſſi, qui jus dicerent*, ſays Learned *Cambden* in his *Britannia Page* 48. for which he cites his Authors.

The *Saxons*, who ſucceeded the *Romans*, divided the Nation into Seven parts, and Conſtituted the *Heptarchy*. It were in vain to ſearch for an Houſe of Lords, or any one Supreme Judicature all that time for all the Nation.

The Supreme Judicature in thoſe times muſt be Seven in number, if any; for the Seven were Independent one of the other.

Moſt part of the State of the *Saxon* Government is ſo obſcure (ſays our great *Selden*) that we can ſee only Steps or torn Relicks of them, rather than ſo much as might give full ſatisfaction.

If there be any thing in their times to our purpoſe, (that is, concerning one Supreme Court of Judicature, to which the whole Nation was ſubject) it muſt fall towards the latter end of the *Saxon* Times; After *Egbert*, King of the *Weſt-Saxons*, had reduced the other parts of the *Heptarchy* under his Obedience; when they did *in unum coaleſcere*, and were all ſeven melted down into one Maſs.

And after the ſeveral Governments and parts were united, though the Government was but One, yet there were Three ſeveral and diſtinct Laws remain'd in force, which had their ſeveral Limits and Precincts. See *Lambert*, *De priſcis Anglorum Legibus*, *Page* 180.

And theſe were not meerly ſome certain different Cuſtoms (for ſo it is to this day in our ſeveral Counties; as of *Gavelkind*, and Burrough-*Engliſh*, &c. but they were under Three diſtinct Syſtems or Bodies of Laws; ſo that it could not be any way practicable during that time, to have any one great Court of Judicature for the whole Land.

By which of thoſe Three Laws ſhould that great Judicature have proceeded?

But after ſome time thoſe Three different Bodies of Laws were found incompatible with one entire Government, as it came to be at laſt; and therefore King *Edgar* (a *Saxon* King) out of theſe Three Bodies of Laws, by the Counſel of his Wiſe men, Compos'd one great Body of Law to be obſerv'd by the whole Nation of *England*. And *Edward* the *Confeſſor* gave new Vigour and Life to this new Body, which was afterwards extracted out of thoſe Three Old Bodies of Laws, and are indeed the Fountain and *Materia prima* of that which we now call, *The Common-Law of England*.

From these we derive our Trials by Twelve Men, our levying of Fines of Lands, and the Offices of Sheriff, Coroner, Constable, and many more of our Laws, Customs, and Offices continued amongst us ever since unto this day.

And these are those good Old Laws of King *Edward* the *Confessor*, which *William* the First (who is stiled the Conqueror) did more than once swear to govern by; which proves him to be indeed *no Conqueror*. And these make up the greatest part of Our *Magna Charta*.

I shall mention some few Precedents, in the time of the *Saxons*, of their Supreme Judicature, and examine what resemblance they bear with that used at present amongst us.

And then I shall give some account of the Supreme Court of Judicature in the beginning of the *Norman* Government during the time of their first Six or Seven Kings; and by the way still examine, how justly any Court now in being, can be said to derive their Power from them, and to Sit and succeed them in their Seat.

And in the last place, I shall make my Conjecture, how and at what time the *Magnum Concilium in Parliamento*, or the House of Peers, first began to exercise the Supreme Judicature.

And while I run through the Precedents, and cite my Authors, whoever reads them, may at the same instant make their Observation of these particulars ensuing, which I conceive will evidently result and arise from them.

1. *First*, That the Supreme Power of Legislature, and the Supreme Power of Judicature (which yet are distinct things in themselves; for it is one thing, *jus dare*, and another thing, *jus dicere*) both these high Powers (I say) under our several Ancient Kings, resided in one and the same Assembly, consisting of the very same Persons, but with different methods in their way of proceeding, that is, whoever had an hand in the * Legislature, was not excluded from the Judicature, wherein it differs from our present Constitution; which is, that the House of Peers, who have but a share in the Legislature, yet now claim to themselves the sole power of Judicature as the last resort.

2. *Secondly*, Another thing that I shall observe out of the several Precedents and Authors that I shall mention, is this, That the great Convention and Assembly that anciently had these Two great Powers of Legislature and Judicature, were but one entire great Body and Assembly, not divided into two or more parts, nor distinguish'd (as now) into Two Houses, or by the names of Lords and Commons; but these Powers resided equally in them, *Tota in Toto*.

3. *Thirdly*,

3. *Thirdly*, That all, or the far greateſt part of the Members of theſe great Aſſemblies, came not thither by the choice, or at the will and pleaſure of the Prince, as he thought fit to ſingle them out by name, (as Peers are made uſually) nor did they all come by Election or Office, though there were ſome of both thoſe ſorts, *viz.* The Biſhops, and the Burgeſſes of the Burroughs: but the far greateſt part came by a certain Right they had to meet in thoſe Aſſemblies; but what gave them their Right, or qualification, or capacity, ſo to meet, doth not ſo clearly appear to an haſty Reader of our Hiſtory, and Antiquities.

It is evident, it was not any meer Title of Honour or Dignity; for Anciently in *England* there were not any Dignities but what were alſo accompanied with Offices, and ceaſed with the Office.

But it did proceed from their Lands and Poſſeſſions: which as they gave them Honour, ſo they gave them Power and Authority in thoſe Ancient Times. And this they learnt from the *Romans*, whoſe Example was followed herein by moſt of thoſe Nations that had fallen under their Conqueſt.

4. *Fourthly*, Theſe Aſſemblies were very great and numerous, far exceeding in number both Houſes of Parliament at this day (were they both put together) ſo that they cannot with any colour of Reaſon be thought an Aſſembly of Lords only, (as our Novel Writers would impoſe upon us;) for it is abſurd to think that ſo great a number ſhould be all Lords, for then there would be none left in the Nation to bear the Character of Commons, ſave only the *Plebs*, or *Fæces Populi*: And the Title or Diſtinction of Lords cannot ſubſiſt, without a body of ſome Inferiors, from whom the Lords may be diſtinguiſh'd.

Tolle Relatum, & tollis Correlatum.

5. *Fifthly*, Though the Freeholders of the ſeveral Counties did not then (as now) meet in thoſe Aſſemblies by their Repreſentatives duly choſen, ſo that any Aſſembly could properly be ſaid to be the Repreſentative of all the Commons of *England*, (which is much inſiſted on by our new ſort of Authors, who would decry and depreſs the Houſe of Commons, as being but of yeſterday, in compariſon with the Antiquity of the Houſe of Lords; that is, but from the Nine and Fortieth year of King *Henry* the *Third*; whereas the Lords have been (as they affirm) from time immemorial, and co-æval with the Nation it ſelf; yet (which is more in Vindication of the Antiquity of the Commons in Parliament) it will appear, that the Freeholders generally met there themſelves, (in the great Aſſemblies then uſed) in their own proper perſons, undiſtinguiſh'd by any ſuch Terms of Lords and Commons, and all were upon the ſame level.

A Repreſentative is but of the Nature of a Deputy, or Delegate, to ſupply the place of one that is abſent; ſuch as in the Houſe of Lords they call Proxies, (who ſometimes have been ſuch as were no Members of that Houſe) and ſuch as in the Convocation of the Clergy they call'd *procuratores Cleri.*

But the great Freeholders, as being the Principals (rightly called) may more properly, and in a true genuine ſenſe be ſtiled, *The National Aſſembly.* Thoſe met in their own proper perſonal Capacity; for the Land-Intereſt in the hands of the true Owner (the Freeholder) is the only true, ſtable, permanent, fixed Intereſt of the Nation. The Farmers and Copyholders were at firſt, and in Ancient Times look'd upon, and accounted, but as Servants and Dependants upon the Freeholders, and little regarded by the Common-Law. And for thoſe that followed Merchandize, and Trade, though they ever ſent to theſe great Aſſemblies by Election, (the Manufacture of Woollen Cloth greatly flouriſhing in the Reigns of King *Henry* the *Second*, and King *Richard* the *Firſt*, which gave occaſion to thoſe Ancient Guilds or Societies that were ſetled in *Lincoln*, *York*, *Oxford*, and other Cities, and Ancient Burroughs in *England*; which Trade was wholly loſt in the troubleſome times of King *John*, *Henry* the *Third*, *Edward* the *Firſt*, and *Edward* the *Second*: And then our Trade ran in Woolls, Woollfels, and Leather, carried out in Specie, till recover'd again by the peaceable times of King *Edward* the *Third*, as the moſt Learned in the Law, the late Chief Juſtice *Hales* does aſſert in his *Origination of Mankind*;) yet thoſe Ancient Burroughs were not then ſo numerous in thoſe Elder times, nor were the Traders then in ſo great Eſteem, as having to do in Moveables only, and a tranſient Intereſt; and as we uſe to ſay, *Here to day, and gone to morrow*, and were therefore of an Inferior account, and made no great Figure. And it was then a Legal Diſparagement for the Guardian in Chivalry to marry the Ward, being the Heir of a Freeholder that held by Knight's Service to the Daughter of the Burgeſs of a Burrough.

6. *Sixthly*, The laſt Obſervation ſhall be this, That the Freeholders encreaſing at laſt, in their number, by the ſub-dividing of their poſſeſſions and tenures, and thereupon growing ſeditious and tumultuous, and an unwieldly Body, and leſs valuable and venerable in their Individuals and particulars, *Mole ruebat ſuâ*, they came to be divided, and the greateſt part of them at laſt diſcontinued their coming to theſe Aſſemblies, and ſo they broke in two, and fell into two Houſes, and their Powers became parted between them; and one part aſſum'd, or had aſſign'd

assign'd to them, some of the Powers, and the other part what was left: *Cùm quercus decidit, unusquisq; ligna colligit.* Yet there is reason to think that it was thus distributed and determin'd by Agreement in a National Assembly.

These Observations and Conclusions I have thought fit and proper to propose, before I peruse the Precedents, and cite my Authors; That the Reader may take notice, by the way, upon the opening of them, how properly, truly, and naturally these Observations result, and are made out, some by one Precedent and Author, and some by another, which otherwise by an hasty reading might possibly escape the being observ'd.

It will not be altogether impertinent, by the way, to take notice of the temper and usage amongst the Ancient *Britons*, before the coming of the *Romans*, testified by our most credible Authors which seem to have a countenance this way, *viz.* of transacting all publick Affairs by the body of the Freeholders: And that it may appear, that this humour of the Nation was, as we use to say, bred in the bone. Although they seldom or never had any National Assemblies, as before hath been observ'd, unless upon some great and extraordinary sudden occasion, like that of chusing *Cassibilan* for their General upon the Invasion by the *Romans*, or the like, which was but temporary.

Tacitus, the *Roman Annalist*, says of the Ancient *Britons*, *De Minoribus rebus Principes consultant: De Majoribus, Omnes. Ita tamèn ut ea quóq; quorum penes plebem arbitrium est, apud Principes prætractentur.*

Note, (*Principes*) here signifies, not Princes or Monarchs, but the great or chief men, as will appear by what follows.

The *Plebs*, or common sort, were not excluded, whenever they did consult, or transact any publick Affairs.

Ziphilinus out of *Dio Cassius*, speaking of the *Britons*. *Apud hos* (says he) *Populus magnâ ex parte Principatum tenet.*

This is not meant of the power of Government, as if they were a Republick, or had any thing of a Democracy; for *Cæsar* in his Commentaries tells us, that the Old and Primitive Government amongst the *Britons*, as to the Title and outward Form of the Administration, was Monarchical and Regal. *Olim Regibus parebant* (says he). But it must therefore be understood, that the People had this *Principatum* in Subordination to the Kings. It was not Engross'd into the hands of an Aristocracy; and what can *Principatus* else consist of, unless in Legislature and Judicature?

Our late Innovators would have us believe, that (*Populus*) doth sometimes signify only the Lay-Lords, met in these Ancient great Assemblies, in distinction only from the Clergy; as when our Annals or Records mention *Clerus & Populus*, (as they often do) it is not (say they) to be understood, as if the Common people met; but

only thoſe of the higher Rank, the Lords, or Nobility. Therefore I have cited *Tacitus*, who ſpeaks of the *Plebs*, or *Plebeians*, who uſed to meet to conſult of the greateſt Matters, *De Majoribus Omnes conſultant*, as before was obſerv'd. (*Omnes*) comprehends the *Plebeians*, and excludes none.

But under their favour (*Populus*) does moſt uſually ſignify All but the higheſt Rank, and is excluſive to them only, though ſometimes by way of diſtinction from the Prince or Clergy.

Thus in that old lofty Title of the *Roman* Republick, *Senatus Populùsq; Romanus*, where the word (*Populus*) is excluſive of the Senate, and diſtinct from it.

Thus Learned *Vinius* the Civilian in his Commentaries upon the Imperial Laws, *Page* 12. ſays *Plebs à Populo differt, Nam appellatione Populi, Univerſi Cives ſignificantur, Connumeratis etiam Patriciis & Senatoribus. Plebis autem appellatione ſine Patriciis & Senatoribus, cæteri cives ſignificantur*; but in no Author (till among theſe new Writers of ours) does (*Populus*) ſignify the Lords or *Patricians*, excluſive to the middle or common ſort (as they would have it.)

To come to the times of the *Saxons*, who next ſucceeded the *Romans*, even in the time of the Heptarchy, We have one Inſtance or Precedent in the time of *Ina*, King of the *Weſt-Saxons*, (which was the moſt Powerful of all the Seven, and at laſt ſwallowed up all the reſt.)

Lambert in his Book, *De Priſcis Anglorum legibus*, Fol. 1^mo. beginning with King *Ina*, Anno 712. ſays, He made his Laws *ſuaſu & Inſtituto Epiſcoporum ſuorum, Omnium Senatorum ſuorum, Et Natu Majorum Sapientum* Populi ſui, *in* Magna *ſervorum Dei* frequentia.

Brampton (the Hiſtorian) as Mr. *Selden* cites him, renders it, *Multáq; Congregatione ſervorum Dei*; and *Lambert* again, Fol. 62. ſays, King *Edgar Anno* 959. (who was one of the *Engliſh* Monarchs after the time of the Heptarchy) gave his Title to his Laws thus, viz. *Leges quas Rex Edgarus frequenti Senatu Sancivit*: and afterwards, *Fol.* 148. in a remembrance and recital of ſome of King *Ina*'s Laws, it is ſaid, *Hoc factum fuit, per Commune Concilium & aſſenſum Omnium Epiſcoporum, Principum, Procerum, Comitum* (no word of *Baronum*) for they were not in being till afterwards in the time of the *Normans*. But the title of King *Ina*'s Laws goes on, and ſays further, *Et Omnium Sapientum, Seniorum, & Populorum totius Regni*; that is, in Engliſh, *The Common-Council of the whole Nation was made up of all theſe, and but* One Body.

In the time of King *Ethelulph*, King of *Weſt-Sex*, there was a great Aſſembly, or Parliament (ſays Mr. *Selden*) held at *Wincheſter*, Anno 855. (now above 800 years ſince:) Where were preſent the Archbiſhop (but one) Biſhops, and *Ducum, Comitum, Procerúmq; totius terræ, aliorúmq; fidelium Infinita Multitudo*, for which he cites *Ingulphus*.

This was at that time the Supreme Judicature, and the laſt Reſort.

There

There was a Proceeding in a Civil Cauſe before their Supreme Court, or *Witena-Gemot*; under King *Eldred*, Son to King *Edgar*, who began his Reign (ſays Dr. *Heylin*) *Anno* 978. one *Leoffus* had bought Land of *Adelwold* Biſhop of *Wincheſter*, and denied to pay for it; And he had alſo diſ-ſeis'd the Biſhop of certain other Lands: *Edicitur placitum apud Londoniam*; where the *Duces*, *Principes*, *Satrapæ ex omni parte confluerant*; which word (*Satrapæ*) extends to the middle ſort, as I ſhall ſhow by and by. The Biſhop *coràm cunctis ſuam cauſam patefecit* (he opened and pleaded his own Cauſe) before them all. *Quâ rè, benè, & ritè, ac apertè ab omnibus diſcuſſa* (not commanding the Parties and Auditors to withdraw while it was debated by the Court) *Omnes reddiderunt Judicium* on the Biſhop's ſide. This Caſe is alſo mention'd by Mr. *Selden* in his Titles of Honour, *Page* 633.

One caſe more that I ſhall trouble the Reader with of the *Saxon* times, ſhall be that of *Earl Godwin* in the time of *Edward* the *Confeſſor*, *Seld. ib.* 634. There the King himſelf, in his own perſon, did Sue an Appeal of Murder againſt Earl *Godwin* for the death of *Alfred*; The *Witena-Gemote* ſate at *London* and the Cauſe was heard before *Omnes Regni Magnates*; where the word (*Magnates*) comprehended alſo perſons of the middle ſort, as well as thoſe of the higheſt Rank, (as I ſhall clearly prove); but the matter was compounded, and twelve Earls bought it off with as much Money as Each of them could carry to the King in their Arms. *Note*, this was in the time of a Saint King too, *viz.* (St. *Edward.*)

I come now to the times of the *Normans*, where we may have a much clearer account, and by the Precedents and Writers of thoſe times, the Obſervations I have made concerning the different Conſtitution of the Supreme Judicature then, from what is now uſed, will much more evidently appear.

William the *Firſt* (ſtiled the Conqueror) though he took great care to enquire out the Laws and Cuſtoms of the Realm uſed in the time of *Edward* the *Confeſſor* (his immediate Predeceſſor) by a Jury of twelve Men out of every County, and took an Oath more than once to obſerve them; yet he introduced a mighty Change in the ſtate of Affairs in diſpoſing of the Lands, and reſerving new Tenures.

But this I may with ſome confidence affirm, that though the perſons were changed, that is, *French* or *Normans* inſtead of *Engliſh* or *Saxons*; yet the Subſtance, the Frame and Conſtitution of the Government ſtill continued as it was before, and likewiſe the Body of the Laws.

The *Saxon Witena-Gemot* now began to be call'd a Parliament, after the *French* Language; but it conſiſted of the ſame ſort of Men, whoſe Right to meet there (I ſpeak as to the generality) was from their poſſeſſions: And in like manner, and of the ſame perſons,

was

was the Supreme Court of Judicature compos'd, though different in power; yet was there no difference in the qualifications of persons.

Now the old titles of *Dux*, Alderman, or Earl, *Heretoche*, *Vavasor*, and *Thane*, were translated into *Comes*, and *Baro*, though very improperly.

But long after this *Æra*, or Epoche, of the coming of the *Normans* (as before), they were no otherwise honorary than meerly as they were officiary, or feodal. There were no Stars that serv'd only to shine and glitter, but they all had their useful influences too: And the honour was but the shadow or reflexion of their Power and Authority, and they had the Ballast too of large Possessions. *Ut Romæ olim Senatores è censu Eligebantur*; so was it ever in *England* till the time of King *Edward* the *First*, or *Edward* the *Third*, when meer swelling Titles came in the place of Offices and Estates.

And it seems very consonant to Reason and Justice, that none be admitted to a share in the Legislature, (which disposes of Lands, and imposes Taxes and Charges upon them;) and that none have a Voice in the Supreme Court of Judicature, (which Judges and Determines ultimately of Estates and Titles to Lands,) but such as have good Estates in Lands themselves; as by the old *Saxon* Law (which continues Law still) that none shall serve of a Jury that is to try the Title of Land, but he that hath a Freehold in Land of his own.

The Bishops in the *Saxon* times held their Lands free from all Secular Service in Frank-almoign; but they had Place and Voice in Parliament, as Bishops, and as they were spiritual only, but not in respect of any Tenure or Baronies, as afterwards they did in the times of the *Normans*. And Burgesses were Elected to Serve for the several Burroughs (which were then but few) as is clearly proved by the Record of *Edward* the *Second*, of a Petition of the Burgesses of St. *Albans*, as it hath been publish'd by Mr. *Petit* of the Temple.

And it is very likely, that the great Officers of the Kingdom came thither by virtue of their Offices. But the greatest part (no doubt) of that great Body, was made up of those who had a Right to meet there in respect of their Possessions (their Freeholds.) And from thence, and from the great Power and Authority which they shared in, at those great Assemblies, they were in the old *Saxon* Laws and Annals stiled *Nobiles*, *Magnates*, *Proceres*, *Primates*, *Principes*, *Seniores*, *Sapientes*, and by such like Compellations.

And from hence have arisen those gross Mistakes and Errors, which some of our late zealous Writers have been guilty of, who affirm, that ever any one House, as now constituted, had that great power from the first Constitution of the Government.

In our *Saxon* Laws and Annals, all the great things that were acted in those times, and all the Laws that were then made, and

the Judgments then given, are reported to be made and done, by perſons deſcrib'd and mention'd by the Titles then in uſe; namely, by the Names of Aldermen, or Thanes; and by the Attributes of *Nobiles*, *Principes*, *Proceres*, and the like.

Our *Norman* Tranſlators when they Tranſlate thoſe *Saxon* Titles, render them (though unduly) in the dialect, and by the Titles uſed in their own Times, *viz. Comites & Barones*; becauſe in their own times none were uſually accounted *Magnates*, *Nobiles*, *Proceres*, *Principes*, and the like, but ſuch as were in those times ſtiled *Comites* and *Barones*. From hence our late inconſiderate Authors, (ſuch as Sir *Robert Filmer*, Mr. *Pryn*, and others) haſtily catch at theſe Miſ-tranſlations, and from thence fiercely argue, that all the power both of Law-making and Judicature under our Ancient Kings were only in the *Comites* and *Barones*, and ſo ſtill ought to be; And that the Commons have but Uſurp'd upon the Houſe of Peers, and that from the time only of King *Henry* the *Third*.

Whereas in truth there were in thoſe times of the *Saxons* no ſuch Titles (as *Comites* and *Barones*) in uſe, to any ſuch purpoſe as they have been applied to, ſince the coming of the *Normans*; and they had another kind of ſignification and power, long after the coming in of the *Normans*, till about the time of King *Henry* the *Third*, than what they have now; and not till much about the ſame time is it that theſe Anti-Commoners allow to be the firſt beginning and date of the Juriſdiction of the Houſe of Commons; and that till then there was no ſuch Houſe.

Our Famous *Selden* takes notice of theſe Miſ-tranſlations of the *Saxon* Laws and Annals by the *Norman* Writers, *Pag.* 604. of his Titles of Honour.

The Tranſlation, ſays he, of (Alderman) or (Earl) in King *Athelſtan*'s Laws into the word (*Comes*) proceeded from the ignorance of them, who, after the *Norman* Monarchy, in their turning and tranſlating the *Saxon* Laws, thought that (Earl) was uſed for (*Comes*) in King *Athelſtan*'s time, becauſe it was ſo afterwards in their own times.

That kind of fault (ſays *Selden*) is moſt common.

Sir *Henry Spelman* (another of our Learned Antiquaries) takes notice of the ſame Errour in our *Norman* Tranſlators, in rendring Words and Titles, *Non è more Sæculi antiquioris*, but according to the Titles of Honour uſed in their own times; when in truth they ſignified different things.

As if a man ſhould go about to prove the Name and Office of *High-Sheriffs* to be as Ancient as the times of the *Romans*; becauſe *Godwin* in his *Roman* Antiquities, *Page* 176. tranſlates the words (*Triumviri Capitales*) into (*Three High-Sheriffs*;) and ſhould argue that whatever was done at *Rome* by thoſe (*Triumviri*) ſhould there-

fore belong to the Office of our High-Sheriffs, which would be ridiculous.

We may as well argue that the vaſt power Exercis'd heretofore in *England* by the *Capitalis Juſtitiarius Angliæ* (as his Title was) who indeed was all one with a Pro-rex or Viceroy (and whoſe Office wholly ceaſed in the time of King *Edward* the *Firſt*) may now be uſed by the Chief-Juſtice of the Kings-Bench, who often hath the ſame Title as (*Capitalis Juſtitiarius Angliæ*) given him.

(*Nobilis*) ſays Mr. *Selden* in the *Saxon* times denoted every Gentleman.

Now becauſe (*Nobilis*) in our times is moſtly reſtrain'd to the Peers of the Realm, whom we call (the Nobility,) our new Writers and Arguers aſcribe all that power to the Lords in *Parliament*, which they read in the *Norman* Tranſlators (ſuch as *Matthew Paris*, &c.) was Exercis'd in the *Saxon* times by thoſe that in thoſe times were ſtiled (*Nobiles*); when in truth that Power and Authority was in the times of the *Saxons* likewiſe in the hands of the middle ſort of perſons in the Kingdom, as well as in thoſe of the higheſt ſort under the *Saxon* Kings, and all then called (*Nobiles.*)

Thus (*Thanes*) who in the *Saxon* times ſignified *Lords of Mannors*, and was not a diſtinction of Honour, is generally tranſlated (*Barones*) by our *Norman* Tranſlators; and that was not ſo altogether improperly done (as I ſhall ſhow by and by;) for the word (*Baro*) from the time of the coming in of the *Normans*, and a long time after, ſignified no more than a (Tenant in *Capite*) and was then no Title of Honour.

The words *Nobiles*, *Proceres*, *Magnates*, *Optimates*, and ſuch like, were not in the *Saxon* times reſtrain'd to the men of the higheſt Rank, ſuch as our Earls and Barons are now; but extended to all perſons of the better ſort, and above the vulgar. Not only to *Patricians* and thoſe of the *Senatorian* Order, (to ſpeak in the *Roman* dialect) but alſo to thoſe of *Equeſtris Ordinis*, excluding none but the *Ignota Capita*, or *ſine Nomine turba*, ſuch as the *Romans* ſtiled (*Plebeians.*)

Sir *Henry Spelman*, in his Gloſſary, *Page* 84. *Avo Henrici primi* (ſays he) *Procerum Appellatione computari videntur Omnes maneriorum Domini*: So that Titles in the *Saxon* times, and in the beginning of the *Norman* times did all reſolve themſelves into *poſſeſſions* of Lands, and were feodal.

For the word (*Magnates*,) it moſt clearly includes alſo thoſe of the middle ſort; or (as I may term it in the now dialect) of the lower Nobility.

Mr. *Petit* of the Temple, in his Book of (the Ancient Right of the Commons aſſerted) cites a Record in the Tower, *Tertio* of *E.* 2. *membrana* 16*ta. dorſo*, *Rotulo clauſo*; where there are theſe words

words enter'd, viz. *Inhibitio, nè qui Magnates*, viz. *Comes, Baro, Miles, ſeu aliqua alia Notabilis perſona tranſeat ad partes tranſmarinas.* So that by this (*videlicet*) *Milites* are comprehended, under the word (*Magnates*), and *Nobilis*, is no more than (*Notabilis.*)

Fleta *lib.* 2. *cap.* 42. *fol.* 93. 37. *H.* 3. *In majori Aula Weſtm. in præſentia Regis, Archiepiſcoporum, Epiſcoporum, Abbatum, Priorum, Comitum, Baronum, Militum, Et Aliorum Magnatum regni Angliæ*, &c. which allows (*Milites*) to be (*Magnates*) in the time of King *Henry* the *Third*, and ſome inferior to (the *Milites*) under the word (*Aliorum.*)

Lambert in his Book *De priſcis Anglor. Legibus. Fol.* 176. recites *verbatim* a Charter of King *Henry the Firſt*, *de Confirmationibus legum* Edwardi Regis. *Teſtibus Archiepiſcopis, Epiſcopis, Baronibus, Comitibus, Vice-comitibus, Et Optimatibus totius regni Angliæ.* So that the word (*Optimates*) ſtoop'd as low as to Knights and Sheriffs (for there were no *Vicounts* till long after the time of King *Hen.* the *Firſt.*)

The ſame ſenſe of the words (*Magnates & Proceres*) appears in a Record of the Exchequer in the King's Remembrancer's Office, *inter Communia brevia de termino Trinitatis.* 34. *E.* 1.

Nay, the words (*Baro & Baronagium*) which one would think ſhould be *Propria quarto modo*, to our Peers, and ſhould be peculiar and characteriſtical Notes of diſtinction between Peers, and all others their Inferiors: Theſe very words had a much larger extent, and were comprehenſive of all Tenants *in Capite*; Nay, communicable to all Lords of Mannors, if not to all Freeholders: And this for a long time after the coming in of the *Normans*, who introduced them firſt amongſt us.

And the very Title of (*Barones*) gives all our Peers, whether dignified with thoſe higher Titles of Dukes, Marqueſſes, Earls, or Vicounts, the ſole Right of Sitting in the Houſe of Peers, and they Sit there *Eo nomine*, and not meerly by force of thoſe higher Titles.

Hence it is, I preſume, that thoſe higher dignities are never conferr'd alone, but accompanied at leaſt with that moſt peculiar Title of the Peers, I mean the Barons.

Now *nomine Baronagii Angliæ, Omnes quodammodo regni Ordines continebantur*, (ſays Learned *Cambden*) in his *Britannia*, *Page* 137.

And Sir *Hen. Spelman* in his Gloſſary, *Page* 66, 67, 68, 69, 70. Upon the words (*Barones Comitatûs*) ſays, *Hoc nomine contineri videtur antiquis paginis Omnis Baronum feodalium ſpecies. Proceres nempè & Maneriorum Domini, nec non liberi quiq; Tenentes, Anglicè* Freeholders, *qui Judiciis præfuere Aulæ Regiæ*, the then higheſt Court of Judicature. *Selden* in his Notes upon *Eadmerus.* Fol. 168.

The ſame Learned Author, in his Titles of Honour. *Fol.* 609. 691. tells us, that in the beginning of the Reign of *William* the *Firſt*, Honorary or Parliamentary Barons, were only Barons by Tenure, and

created

created by the King's Writ or Charter of good Poſſeſſions, whereby *William* the *Firſt* reſerved to himſelf a Tenure in Chief by Knight's Service, or by Grand Serjeanty. And that Knights Service was to ſerve the King upon occaſion with ſuch a number of Men at Arms as was reſerv'd by the Charter, or Grant; and this is called a Tenure *per Baronagium*, and the number of all the Knights Fees (out of which Baronies were made up) amounted (as *Ingulphus*, who lived in the Conqueror's time, ſays,) to Sixty thouſand Knights, or Men of War.

Now theſe Tenants in *Capite* were the moſt of thoſe that made up the great Aſſembly, called a Parliament, and they were the Judges of the Supreme Judicature; for, as Mr. *Selden* ſays, in thoſe times, *Tenere de Rege in capite*, and to be a Baron, or to have a Right to ſit with the reſt of the Barons in Councils, or Courts of Judgment, according to the Laws of thoſe times, are *Synonomies*, and ſignify the ſame thing.

All theſe Tenants *in Capite* (had the whole Kingdom been put into a *Scale*, and weighed as *Bocaline* the *Italian* weighed all the Princes and States in *Europe*: Theſe Tenants *in Capite* (I ſay) made up the greateſt part of the weight, I may ſay, the whole weight, if Land only were to be weighed.

For under theſe Tenants *in Capite* by degrees in proceſs of time, all the Freeholders derive their Eſtates, who are therefore to be accounted as caſt into the Scale with the Tenants *in Capite*; who originally had all the Lands: For Leaſe-holders, Farmers, and Copy-holders, are but in the nature of Servants or Perſons imploy'd under the Freeholders; and the Copyholders did truly and literally hold their Lands at firſt *ad voluntatem domini*, till time gave it the Reputation of a Legal Cuſtom, and to a more durable intereſt; and Leaſes for above 40 years, were not allow'd in thoſe ancient times; but adjudg'd and held to be void, as vying in value with Inheritance; but they have of later times been countenanced by Courts of Equity, and made equal in eſteem with Freehold Eſtates and Inheritances, being altogether under the Rule and Government of thoſe Courts, and having their dependance upon the decrees of thoſe Courts, and have the ſame privileges and favours with Inheritances, under the new notion of being by their decrees made to wait upon the Inheritances, and ſubject to Truſts, which thoſe Courts take upon them to have the Controulment of; and hereby the Freehold and Inheritance of Lands are of little regard and value, in compariſon of thoſe high powers and privileges which by the Law and Original Inſtitution of the Nation did at firſt belong to them: All this tends to the great Subverſion of the Common-Law, and of the very Conſtitution of the Nation; and to all the good Rules and Orders of it; and in length of time, if not before remedied, will bring all Eſtates in Land to depend upon

upon Decrees in Equity, and to be Ruled by their Arbitrary Proceedings, and then farewel to the Common-Law.

And theſe Freeholders, who were but the offspring of thoſe Ancient Tenants *in Capite*, are by the Common-Law, the true and right Owners and Proprietors of the Kingdom: And accordingly, as in them was the true value, ſtable, firm, and fixed intereſt of the Nation; ſo in them did the Law place the Power and Government under the King, (who was always the Supreme in the Adminiſtration.) Hence it is, that a Trial by Freeholders, is in the Senſe and Language of the Law, a Trial *per patriam*; for they are indeed the Country, and the Country is truly theirs.

And it is a mighty power if we Enquire into it, and much of it ſtill remains; though it has been exceedingly abated and humbled, by the ſwelling of Equity, and by certain Acts of Parliament made in troubleſome Reigns; yet there are ſome remains, and the marks and footſteps of thoſe many and great benefits that are lopp'd and pared off from it.

Theſe Tenants *in Capite*, and Freeholders were the Perſons who under our Kings made up the Primitive Conſtitution of our Government, both as to the Legiſlature, and the Supreme Judicature, or laſt Reſort, though now thoſe powers run in a new Channel.

I ſhall inſtance in ſome of thoſe Ancient and Inherent Rights and Freedoms, which thoſe Freeholders, or Tenants *in Capite* did enjoy at the Common-Law, and in the times of the *Saxons*, and from times as Ancient as any Records do reach, till, by ſeveral Acts of Parliament, made for the moſt part in unquiet times, they were depriv'd of them: Which will beſt diſcover the true and original Conſtitution of the Government, and give great light to the matter we have now in hand, *viz.* to find out the Supreme Judicature.

Almoſt all the Suits and Cauſes that did ariſe in the Nation, came under the hands and power of the Freeholders, *ad primam inſtantiam*, at the firſt riſe of them, and they judged of them both as to matters of Fact, and points in Law, in the Country.

And then the greater and weightier matters of the Law met the ſame perſons again at the laſt Reſort of all Cauſes in the *Witena-Gemots*: For theſe Freeholders made up the main body of thoſe Common-Councils and great Aſſemblies.

Sir *Hen. Spelman*, in his Gloſſary. *Fol.* 70. ſpeaking of the *Magnates* and *Proceres*, explains who were meant by thoſe high terms, that is, the good Freeholders. And he ſhows likewiſe what Judicial power they had, in thoſe firſt times.

Magnates, and *Proceres*, were they, *Qui in Curiis præſunt Comitatuum, hoc eſt, Ipſarum Curiarum Judices, quos Henricus primus*, (the Son of the Conqueror,) *legum ſuarum cap.* 30. *eſſe libere tenentes Comitatus demonſtrat. Regis Judices* (*inquit*) *ſunt Barones Comitatus, qui li-*

liberas in *eis terras habent*. There are the Persons and Judges, *viz.* Freeholders: *Per quos debent Causæ Singulorum alternâ prosecutione tractari.* There you have their Power and Jurisdiction.

Among the Laws of King *Henry* the *First*, *c.* 7. Collected by Mr. *Lambert*, *de priscis*, &c. *Fol.* 180. The Title of the Law is, *De generalibus placitis Comitatuum quo modo vel quando fieri debeant.*

Sicut antiqua fuerat institutione formatum generalia Comitatuum placita certis locis & diffinito tempore convenire debent; Nec ullis ultra fatigationibus agitari, nisi propria Regis Necessitas, vel Commune Regni Commodum sæpius adjiciat.

Interfint autem Episcopi, Comites, Vice-domini, Vicarii, Centenarii, Aldermanni, præfecti, præpositi, Barones, Vavasores, Tungrevii, & cæteri Terrarum Domini. These were the Judges of the Court.

Then for the Extent of their Jurisdiction, and the Universality of the Causes, it proceeds thus, *viz.*

Agantur primò Veræ Christianitatis Jura, now termed Ecclesiastical Causes. *Secundò Regis placita*: Pleas of the Crown, or Criminal. *Postremò Causæ singulorum*, between party and party.

And in the time of the *Saxons*, who first introduced this Course and Method of Justice, Suitors were not permitted to pass by this first Application and Address, before the *Barones*, or Freeholders, (whom now we call Free-suitors at the County-Court) and *per Saltum* to begin at the Courts of *Westminster*, or to follow the King's: *Lambert de priscis*, &c. Fol. 62.

It is amongst the Laws, *quas Edgarus, Anno* 959. *frequenti Senatu sancivit, Fol.* 63. *Nemo in litem Regem appellato, nisi quidem domi, justitiam impetrare non poterit: Sin summo jure urgeatur* (if he meet with hard measure in the Country) *ad Regem provocato*; that is, to the King in his highest Court.

Then was the proper time of Appealing to the King in his great Council (as it is said in that *Magnum placitum*, in Ryley's *Placita Parliamentaria*, *Page* 84. between *Humphrey de Bohun*, Earl of *Hereford*, and *Gilbert de Clare*, Earl of *Glouceſter*, (and they are the very words of the Judgment in that Case) *Dominus Rex est omnibus & singulis subditis suis Justitiæ debitor.*

But the King alone in his own Person never Administred Justice or Equity, but together with his great Court, or by his Delegates (the Judges) in inferior Courts, as I have fully prov'd in my Treatise of the *Chancery*.

These great Freeholders, or Tenants *de Rege in Capite*, as they were, and still are the Judges of the County-Court, (which in Ancient times was the most busy Court,) so they had by the Common-Law, and from time as far as any Record, or *English* History does reach, that mighty freedom of chusing all both Civil and Military Officers or Magistrates under whom they lived.

They

They chose those that the *Saxons* call'd *Heretoches*, or *Ductores Exercitus*, whom, according to the dialect of the present times, we call Lord-Lieutenants, and Deputy-Lieutenants, and the rest of the Commanders. These they chose at their Folk-moot, or County-Court.

These Freeholders chose the Sheriffs of the several Counties, which we all know by sad Experience, many times, nearly concerns our Lives, Estates, and Liberties: For these Sheriffs have the *posse Comitatus*, and the Return of Juries, and the Execution of all publick and private Justice.

These Freeholders had the Election of the Conservators of the Peace, who had that power which is now in the hands of the Justices of the Peace, and hath been so from the beginning of the Reign of King *Edward* the *Third*, at which time it was wrested out of the hands of the Freeholders by an Act of Parliament procur'd by Queen *Isabel*, during the Life-time of her deposed Husband, and in the Minority of her Son King *Edward* the *Third*, meerly to gain the power of the Kingdom into the hands of her party that she made against her Husband (the deposed King.) And ever since the Conservation of the Peace hath been in the hands of the Commissioners, or Justices of the Peace. This we are taught by our Acts of Parliament, and by the Learned Lawyer and Antiquary (Mr. *Lambert*) in his *Eirenarcha*, Fol. 16. and 19, 20. and 147. and by Sir *Edw. Coke* in his Second *Instit.* Fol. 174, and 558.

These Freeholders ever did, and still do to this day chuse the Coroners (who were heretofore the most sufficient Knights of the County.)

And they still chuse the *Verderors* where there are any Forests.

All this appears to have been the Right of the Freeholders long before the Conquest. See *Lambert*, in his Book of the *Saxon* Laws, *Fol.* 147. among the Laws of King *Edward*.

Erant & aliæ potestates & dignitates (for Power and Offices, Titles and dignities in those times went hand in hand.) *Per provincias & per singulos Comitatus totius Regni constitutæ qui* Heretoches *apud* Anglos *vocabantur. Sc. Barones, Nobiles, & insignes sapientes; Latinè verò dicebantur Ductores Exercitus. Isti verò viri eligebantur per commune Concilium per singulos Comitatus in pleno Folk-mote, sicut & Vice-comites Comitatuum Eligi debent. Ità quod in quolibet Comitatu semper fuit Unus Heretoch. Electus.*

These are not the words of Mr. *Lambert*, or meerly his Opinion and Conceit, he only recites the words of the Law in the *Saxon* times. And the Law does refer it to the times of the *English*, or *Britons*, for they were the men who called these Leaders by the name of *Heretoches*.

Thus

Thus we ſee how large an extent this word (*Barones*) did bear; that it comprehended all Tenants *in Capite*, who at firſt were the only Freeholders: Till by Subfeodations the number of Freeholders encreas'd infinitely, which cauſed a great alteration. But the firſt Tenants *in Capite* had large Poſſeſſions.

Notandum eſt (ſays Sir *Hen. Spelman*) *libere hos tenentes nec tam exiles olim fuiſſe, nec tam vulgares, ut hodiè deprehenduntur, nam villas & dominia in minutas hereditates nondum diſtrahebant.*

We have ſet forth their Country Juriſdiction; now to ſpeak a word of their Supreme Juriſdiction.

Sir *Henry Spelman* in his Gloſſary tells us, *Barones olim de cauſis cognoſcebant ad Aulam Regiam delatis.* There was the laſt reſort, and the Court of Equity.

King *William* the *Firſt* (ſays Mr. *Selden*) in the 4th year of his Reign, brought the Biſhops and Abbots under the Tenure by Barony, *Concilio Baronum ſuorum*, which by the Proofs that I have already offered, ſignify the Tenants *in Capite*, and the Eminent Freeholders, and a Parliament, (as Mr. *Selden* takes it.)

The Biſhops contended earneſtly againſt it; for the Power and Juriſdiction being then in the hands of ſo great a number, it made it the leſs deſirable; ſo that, as Sir *Hen. Spelman* tells us, The Clergy look'd upon it as a diminution of their former Immunity and Freedom which they had aſſum'd and adjudg'd due to themſelves. *Detrahere videtur nomen Baronis ab Eccleſiaſticarum Immunitate quam tunc Eccleſiaſtici maximè ſplendebant. Hoc, noſtratibus* (ſays Sir *Henry Spelman*) *jugum injecit, Omnium Primus, Willielmus Senior.*

But in the Tenth year of King *Henry* the *Second*, *Thomas* of *Becket*, that proud and inſolent Prelate, would have caſt off this Yoke again, like a Son of *Belial*, and he ſtifly ſtood upon the Exemption of the Clergy. Then (ſays *Selden*) that great Parliament at *Clarendon* was held: And *Roger* of *Hoveden* ſays, that *Clerus & Populus Regni* were then Aſſembled, which Mr. *Selden* expounds to be a Parliament.

In this Parliament (ſays *Selden*) thoſe *Avitæ conſuetudines* (which made the great quarrel between *Thomas* of *Becket*, and King *Henry* the 2*d.*) were Recogniz'd.

And it is very material towards the deciding of another great Controverſy that has of late been agitated, that Cuſtom for the Prelates withdrawing from matters of Blood, is recited as one of theſe *Avitæ Conſuetudines*; for the Biſhops (as I obſerv'd before out of Mr. *Selden*) had places in thoſe general Conventions in all the times of the *Saxons*. And in all thoſe times it ſeems it was their cuſtom to withdraw: For it was *Avita Conſuetudo*, and we know that Cuſtoms muſt be exactly purſued. And this Cuſtom is acknowledg'd and declar'd by Act of Parliament, (the Parliament at *Clarendon*.

rendon.) Though by the Ancient Canons of the Church, (which was the ground of that Cuſtom) at firſt it was left to their own choice.

Among thoſe Articles this was one, *Quod Archiepiſcopi, Epiſcopi, & Univerſi Perſonæ qui de Rege tenent in Capite, habeant poſſeſſiones ſuas de Rege, ſicut Baroniam, & ſicut cæteri Barones Debent intereſſe Judiciis Curiæ Regis cum Baronibus quoúſq; perveniatur ad Diminutionem membrorum, vel ad Mortem.*

Who theſe (*Barones*) were in thoſe times moſt plainly appears by this very Law, *viz.* They are ſuch *Qui tenent de Rege in Capite*: And what their Right, and Power, and Juriſdiction is, (for which purpoſe I chiefly cite it) *debent intereſſe Judiciis Curiæ Regis*: This *Curia Regis* plainly appears to be the Supreme Judicature, which we are enquiring after, and which ſome late Writers conceive did in all times belong to the Houſe of Peers; but 'tis a miſtake in them, by occaſion of the word (*Barones*) mention'd in it; And they think it bears their Signature, and peculiarly belongs to them: Whereas by this Law it undeniably appears to belong to that vaſt number of Tenants *in Capite.*

And if we may believe Sir *Henry Spelman* (who is *fide-dignus*,) the Honour was ſo much the leſs, becauſe it was transferrable.

Cum autem feodales iſti Barones nomen dignitatémq; ſuam ratione fundi obtinuerint, transferre olim aliquando videatur cum ipſo fundo. The *Terra* did *tranſire cum Onere*, for ſo the Honour, being accompanied with a Duty, was accounted in thoſe days: *Honos* was not without the *Onus.*

The only Titles that we meet with in the *Saxon* times, as we learn out of Mr. *Lambert*, Sir *Henry Spelman*, Mr. *Selden*, and Mr. *Cambden*, are *Alderman*, which in the times of the *Danes* was tranſlated into *Eorl*; and in the *Norman* times into *Comes.* And the Title of *Heretoch.* (which I have juſt now Explain'd) and thoſe other Titles of *Vavaſor*, and *Thane*, had all a reference to poſſeſſions in Land; And were rather Officiary than Honorary, and were generally due to theſe Tenants *in Capite*, who were the ſame with (*Barones.*)

For that of *Alderman*, or *Comes*, or *Satrapa*, ſays *Cambden*, in his *Britannia*, Page 135, and 136. *Comitis nomen ut dignitatem notaret ſine adminiſtratione, in uſu non fuit*, in the Elder times; and ſo ſays *Selden* in his Titles of Honour, Page 604.

Nec dum hæreditaria fuit dignitas: Initio dignitas temporaria, poſtea vitæ æqualis. But in that Age, Titles of Honour and Place were no more hereditary, than Virtue and True Worth were, which are not *ex traduce.*

In the beginning of *William* the Conqueror, *Comites cæperunt eſſe feodales & hereditarii.*

Dux nomen Officii, non Honoris, ſays *Cambden*, Page 134, 135.

Oneris, non Honoris. It was no Title of Honour, till King *Edward* the *Third* made his Son *Edward* the Black-Prince, Duke of *Cornwal.*

And King *Richard* the *Second*, (that Prince's Son) made *Robert de Vere* the firſt Marqueſs, that is, of *Dublin.*

And King *Henry* the *Sixth* made the firſt Viſcount, which ſtill is alſo a name Officiary.

Selden's Titles *&c. page* 621. The King's *Thane* was he that held of the King in chief by Knight's Service. He was of the ſame kind with them, who after the coming of the *Normans*, were Honorary, or Parliamentary Barons.

The name of *Vavaſor*, ſays *Seld. ib.* 625. was feodal only, and not at all honorary. In *Doom's-day* (ſays he) it ſometimes occurs as a *Synonomy*, with *liberi homines Regis.*

Theſe Tenants *de Rege in Capite*, were the Perſons that had Right to Sit in Parliament, and in the Supreme Judicature and Councils, during the times of the firſt Six or Seven of the Kings next after the coming of the *Normans.* *Selden's* Titles, *&c.* pag. 705. To the *Magnum Concilium*, and *Solenne Concilium.*

King *Henry* the *Second*, *Omnibus qui de Rege tenebant in Capite mandari fecit*, &c.

And Mr. *Selden ib.* pag. 701, and 702. gives us Precedents of Cauſes Determin'd in this High and Supreme Judicature.

As that between *Thomas* Archbiſhop of *York*, and *Ulſtan* Biſhop of *Worceſter*, touching certain poſſeſſions, *Anno Quarto* of *William* the *Firſt.*

In Concilio Coram Rege, Archiepiſcopo, Epiſcopis, Abbatibus, Commitibus, & Primatibus totius Angliæ; and it hath already been ſhewn, who are underſtood by (*Primates.*)

And *ib. pag.* 703. There was a Decree made touching the Primacy of *Canterbury*, *Totius Regni aſſenſu* (ſays *Eadmerus*) which (ſays *Selden*), expreſſes a full Parliament, ſuppos'd to be in the Fifth year of the ſaid *William* the *Firſt*, at *Pinneden* in *Kent.*

Now for the mighty number of which this great Aſſembly did ever conſiſt, Mr. *Petit*, in his Book, wherein he aſſerts the Right of the Commons, *pag.* 100. cites a paſſage out of *Matth. Paris.* pag. 255. who ſays that in the year 1215. *Decimo Sexto Johannis Regis*, there met *Tota Angliæ Nobilitas in Unum collecta, quæ ſub Numero non cadebat*; and yet 'tis call'd (*Nobilitas.*)

And *Cambden*, in his *Britannia*, pag. 137. ſpeaking of their number, ſays, *Ipſáq; Baronum multitudo perſuadet tales fuiſſe Dominos qui jus in ſuâ ditione dicere poſſent.* All Lords of Mannors that had their Courts Baron, which from thence had alſo their name of *Courts Baron.*

Sir *Hen. Spelman* in his Gloſſary ſays of theſe Barons, That they were *Ingens Multitudo*, *quæ plus minus*, were Thirty thouſand, *nullo tecto Convocari poterat.* Therefore they met

met in great Camps and Fields. And Sir *Hen. Spelman* ſays, He can hardly believe (*Quod nonnulli perhibent*) *quod Omnes Barones locum aliquando in ſummis illis Comitiis obtinuiſſe*, becauſe of their vaſt number.

By all this that hath been ſaid, and ſo fully proved, I ſuppoſe it clearly appears, that thoſe that made up the Aſſembly for the Legiſlature, and Supreme Judicature, came thither by a feodal Right (unleſs the Burgeſſes only, and ſome Eccleſiaſtical Perſons, and ſome great Officers.)

Here is not in all theſe Precedents, Records, or Teſtimonies of approved Authors and Antiquaries, the leaſt mention of any diſtinction among them, like that of Lords and Commons, or Upper and Lower Houſe; or that they were divided in their place of Sitting or Meeting; for as is before obſerv'd, their number was ſo vaſt, that *nullo tecto convocari poterant.* No one Houſe could hold them.

In the caſe of *Godſol*, and Sir *Chriſtop. Heydon*, 12. *Jac. in Serjeant Rolls* 1. *Rep. Fol.* 18. It was affirmed by Sir *Edward Coke*, that in Ancient Times all the Parliament ſate together; and that he had ſeen a Record of it in the Thirtieth year of *Henry* the Firſt. But *William Pryn* (according to his accuſtomed humour) contradicts Sir *Edward Coke* in this, in his Preface to Sir *Robert Cotton's* Abridgment of the Records of the Tower.

It may be concluded, that they all had a Right to come to the great Convention; for had they all been called by ſpecial Writs, (as the Lords now are,) the King would never have call'd ſo great a number, which do but hinder buſineſs.

There is not the leaſt mention of ſpecial Writs, and it would have been an infinite Work to iſſue out ſo many Writs, Printing not being then invented. Therefore no doubt but they came thither by a general Summons. There is not the leaſt intimation of any diſtinction in their Power, but every one had a like ſhare in the Power, both in the Legiſlature and Judicature.

None came amongſt them by a meer Title of Honour and Dignity, but in Right of their Poſſeſſions and Tenures. This was not indeed the Repreſentative of the Nation; but, (as I ſaid before) the Principals, and in effect, the whole Body of the Nation, which is much greater.

But at laſt this great Body fell with its own weight; for, ſays Sir *Hen. Spelman*, *Cùm ſua tandem laborarent multitudine Conventûſq; ſic magis premerent quàm Regni Negotia Expedirent*, (they did rather hinder than help) *Conſultius viſum eſt, ut neglectis Minoribus, præcipui tantùm, per breve Regis evocarentur.* It was with this Conſtitution of the great Aſſembly of the Freeholders of the Nation, as it happen'd with the City of *Rome*, when it had attain'd to its *Acme* and full growth, *Mole ruebat ſuâ.* And

And Learned *Cambden* tells us in what time a diviſion of this great Body was effected. *Henricus Tertius* (ſays he,) (in his *Britannia*, *pag.* 137.) *Ex tantâ Multitudine* (ſpeaking of the Parliament in thoſe times) *quæ ſeditioſa & turbulenta fuit*, *Optimos quoſq; Reſcripto ad Comitia Parliamentaria evocaverit.*

Here we have plainly the Original of the Houſe of Peers, and of particular and ſpecial Reſcripts or Writs of Summons to the Optimacy, diſtinctly, and by themſelves. *Cambden* quotes his Author for this, but names him not. *Ex ſatis antiquo Scriptore loquor*, (ſays he.)

It was referr'd to the King to ſingle out, and ſelect ſome to whom he thought fit to direct his ſpecial Writs or Summons, and theſe and no other were to come to Parliament.

If this may be credited, then we have the *Epoche*, and the Date of our preſent Conſtitution, and the Original of the Diviſion of that very ancient, great, and numerous Aſſembly; and it made a mighty *Metamorphoſis* and Change. The Freeholders parted with that great Power and Intereſt which they had both in Legiſlature and Judicature, from the very Foundation of the Government, and the Nation it ſelf: Even from the time of the *Ab-origines*, (if there were ever any ſuch,) and they have been upon the loſing-hand ever ſince, as appears by what I have already obſerv'd in loſing their Rights of Elections.

And thus they brake in two, and became two Houſes both at one time, and were Twins in their Birth. Here was no *Primogeniture*, yet the one went away with a double portion upon the parting.

And this (taking in the Hiſtory) is a confutation of that Opinion, That the Houſe of Commons (as being by Election) was in time long after the Date of the Houſe of Peers; ſurely they ſtarted both together.

Great *Selden* agrees in the Subſtance with Mr. *Cambden*, but differs from him only in the time, and ſome other circumſtances, when this Revolution happen'd. And for Mr. *Cambden*'s *ſatis antiquus Author*, Mr. *Selden* profeſſes he diligently ſought for this Author, but could never meet with him; nor does Mr. *Selden* give any credit to that Author.

(*) He ſuppoſes the diſtinction of *Majores*, and *Minores Barones*, (which doubtleſs did ariſe upon this Revolution) *pag.* 708. began not long before the great Charter of King *John* (Father to King *Henry* the *Third*) and that Charter was made in the Seventeenth and laſt year of King *John*.

This Diviſion of *Barones* (which all Writers agree in, and which appears by King *John*'s Great Charter) evidently ſhows, that the two Houſes began at the ſame time; for *Majores* cannot be with-

out the *Minores*. But Mr. *Selden* ſuppoſes this was done by Act of Parliament, though that Act be not now Extant: Nor is there any expreſs Memorial of it. And he ſuppoſes it was not ſubmitted to the King to chuſe out whom he thought fit; But that the Act of Parliament did mention them by name at firſt, to whom particular Writs were to be directed.

Some part of the very words of that Charter of King *John*'s we have in Mr. *Selden*'s Titles of Honour, *pag.* 709. and in Sir *Hen. Spelman* in his Gloſſary, *pag.* 83. *Faciemus* (ſays that great Charter) *Summoneri Archiepiſcopos, Epiſcopos, Abbates, Comites, & Majores Barones Regni*, Sigillatim, *per literas noſtras*: *Et prætereà faciemus ſubmoneri* in generali *per Vice-comites Omnes alios qui in capite tenent de Nobis*; which is a clear proof, that till about this time, there was no diſtinction: And that which did Conſtitute a Parliamentary Baron, was his Tenure *de Rege in Capite*; ſo that all who held *in Capite*, had an inherent Right to ſit there. And that before this time, all came by a general Summons directed to the Sheriff.

What hath been hitherto ſaid ſerves to prove, That before this time of King *John*, or King *Henry* the 3*d* (his Son) there was only one great Aſſembly of the Nation; that is, of the moſt Eminent, and all the conſiderable and intereſted perſons of the Nation, who came not by Election, ſave thoſe that were choſen from the few and ancient Burroughs: Nor was there then any Repreſentative, as now.

And that thoſe great Aſſemblies were in thoſe times the true Baronage of *England*, and that the word (Baronage) did not belong only to ſuch as the King by ſpecial Writ is pleas'd to call or ſummon; or by Patent to confer the Title upon; but as our moſt judicious Writers tell us, the word (*Baronagium*) did extend to all Degrees and Orders; for they came to all great Aſſemblies by Tenure, till the aforeſaid time of Diviſion.

And there are the footſteps of this Ancient Right ſtill amongſt us, in that the Freeholders (whom we call Free-ſuitors) are ſtill the Judges of that Court, which Anciently was the great and buiſy Court (the County Court.) And thoſe Elections that are ſtill remaining of Truſtees or Repreſentatives in Parliament, and of divers Legal Officers, which muſt be by Freeholders only, and the perſons to be choſen, ought to be out of the Freeholders themſelves.

And ſo much of the Ancient Conſtitution of a Baron ſtill remains, as that in his Creation he muſt be entitled of ſome place, that it may ſavour of the Realty, and make the Honour and Title Inheritable.

And the Baron ſtill continues his Freedom from Arreſts, as having by preſumption of Law, an Eſtate in Land, which will make him liable to Juſtice: And therefore a *Diſtringas* ſhall iſſue out againſt him inſtead of a *Capias*. And the Law will allow of no Averment againſt a Peer, that he hath no Lands whereby to diſtrain or to levy Iſſues upon.

No doubt but the Lords had from the time of this great Diviſion ever ſince, a very large, though not an univerſal Juriſdiction; nor have they had it from the very firſt Conſtitution of the Government, as is by ſome pretended.

When this great Aſſembly, this great and numerous Body, was divided into parts, no doubt but the ſeveral parts did (as the Four great Captains after the Death of *Alexander* the Great did) aſſume and take to themſelves by Agreement, ſeveral ſhares of the power that was then diſſolv'd.

The Lords took a large ſhare, and the Commons, (for ſo now they began to be diſtinguiſh'd) took the reſt; and we may reaſonably ſuppoſe it was confirm'd by ſome Law that then paſs'd, and hath been ſince loſt.

And the like preſumption we know is made by our Courts of Law in many like caſes: And it is well known that the Parliament-*Rolls* of that time are all loſt.

And the beſt Rule whereby to judge what was allotted to each, will be by ancient, conſtant, quiet, and uninterrupted Uſage and Practice. *Uſus & conſuetudo eſt Lex Parliamenti.*

The Houſe of Lords did exerciſe a Juriſdiction in caſes of Appeals for Criminal Cauſes, till by the Act of 1^mo. of *Henry* the 4th c. 14. they were reſtrain'd.

That Act doth Ordain, That *from thenceforth no Appeals ſhall be purſued in Parliament*, the Expoſition of which Statute muſt be made by obſerving the miſchiefs that occaſion'd the making of that Law, and the conſtant practice after it.

The preamble recites, That many Miſchiefs did often ariſe by Appeals: And the Hiſtory of the times of King *Richard* the 2d. (the next preceding King) tells us what thoſe Miſchiefs were: When in that diſorderly troubleſome Reign, the Lords were ſo divided into Feuds and Factions, that the Lords (who were to be the Judges) became Parties, and were Appellants one againſt another. This was the miſchief.

Then for the practice after the making of that Act, that Law was never intended according to the generality of the words, to exclude all Appeals whatſoever, but ſuch only as were at the ſuit of private perſons.

For the conſtant practice hath been, ever ſince, as well as before, to admit of Appeals in Parliament, when they come to the Lords by Impeachment from the Commons.

The Lords had, and ſtill retain, the Juriſdiction over their own Members, for trial of Peers in caſes Capital.

The Lords had, and ſtill have the Juriſdiction in Writs of Error, to examine Judgments given in the King's-Bench; but this was under certain Rules, and with ſome reſtraint; for conſtant and quiet uſage and practice do warrant all theſe.

Let us enquire into the *placita Parliamentaria*, I mean thoſe that are publiſh'd by Mr. *Ryley*, of the times of King *Edward* the *Firſt*, King *Edward* the *Second*, &c. and obſerve what light they give us.

The true Title of thoſe Pleas are *Placita coràm ipſo domino Rege & ejus Concilio, ad Parliamenta ſua.* In which Titles, *Regis Concilium, & Parliamentum*, ſeem to be diſtinguiſh'd, and to ſignify two ſeveral things (as in truth they did.)

When and how came theſe Pleas to be diſcontinued ever ſince

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the time of *Edward* the 4*th*? When did the Law paſs that reſtrain'd them? We have not one ſuch Plea to any effect, between the time of King *Edward* the *Fourth*, and the time of King *James* the *Firſt*, nor from thence to this day, near 300 years. What is come in the place of them?

The *Placita Parliamentaria* were in a ſtrict and regular form of Pleadings. The Petition or Declaration, the Plea, the Replication, the Rejoinder, and the Continuances entred upon Record in *Latin*, and the proceſs was by Latin Writs; and all the Proceedings entred upon Record in *Latin*, as Proceedings at the Common-Law ought to be. How came this to be altered? All of later times (at leaſt before the Lords) are in *Engliſh*, and the proceſs are *Engliſh* Orders only.

Had theſe *Placita* been before the Lords, how happens it that there are ſo few (if any) Reports among them of Pleadings upon Writs of Error, which the Lords claim as out of all diſpute to be within their Juriſdiction? Hardly any of theſe are to be found amongſt them; and theſe had been worthy Reporting, being in matters difficult, weighty, and full of Learning.

What was this *Regis Concilium* (ſo conſtantly mention'd) in theſe Pleas, as thoſe before whom they were held?

☞ Amongſt theſe Records and Pleas, we find *All the Peers* themſelves in a Body ſeveral times petitioning to the King and this Council, and receiving Orders and Rules from that Council.

It is abſurd to think, that all the Lords in a body would petition to themſelves; as at the Parliament held 14*th* of *Edward* the *Second*, *Ryley's Placita Parliamentaria*, pag. 425.

Ex parte Prælatorum, Comitum, Baronum, & aliorum, porrecta eſt petitio in hoc Parliamento, in hæc verba.

A noſtre Senior le Roy & a Son Counceil *monſtrent les Erce-eveſq; Prælats, Counts, & Barons, & les auters grantz Seigniors dela terre.*

Concerning payment of Eſcuage. And the Anſwer to this Petition is, *per Concilium Regis*, the like *ib. pag.* 448.

We have another Example of it in the *Appendix* to that Book, *viz.* of the time of 18 *Edward* the *Second*, pag. 619. wherein the Lords in a body pray liberty to approve or improve their Mannors, without the King's Licenſe. And the Anſwer to it is, That it could not be done without a new Law, to which the Commons would not conſent.

It is evident in thoſe Records and Pleas, that others are mention'd to be of that Council, then the Peers, as *pag.* 266, and 331.

There is an Inhibition by the Treaſurer, and the *Concilium Regis*, not to deliver a Priſoner; and *page* 386. 14*th Edward* 2. the King appointed who ſhould *receive* Petitions at the Parliament, and who ſhould Anſwer them: And thoſe that were appointed to Anſwer them are called *Triers of Petitions*: Theſe ſeem to be the perſons that made the great Council, or the King's Council, (as they are called in thoſe Records.) Theſe in Parliaments of late have been wholly diſcontinued.

We find this Council, while they were in being, ſate in Places, where

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we cannot reaſonably ſuppoſe that the Houſe of Lords ever ſate; as *pag.* 87. in Mr. *Ryley's Placita Parliamentaria, Coràm Rege & Concilio apud Lond. in domo Ottonis de Grandiſſono, extra palatium ipſius Domini Regis apud Weſtmonaſterium.* And pag. 98. at *Bergavenny*; and pag. 108. at *Stilbeneth. extra London*, which I ſuppoſe is meant of *Stepney*.

And the Judges are mentioned as Members of this Council, *pag.* 140. not meer Aſſiſtants.

Now we come to Writs of Error; wherein it is generally admitted, that the Lords have a Juriſdiction, and from thence (as I ſuppoſe) it is inferr'd by a parity of Reaſon, that they likewiſe have a Juriſdiction in Appeals from Courts of Equity. An Appeal from a Decree in Equity being ſomething of the ſame nature with a Writ of Error at the Common-Law.

It is true our Law-Books are full of this Title, and ſpeak of Error ſued in Parliament. But under favour it is not of an univerſal Juriſdiction in all Caſes of Erroneous Judgments, but with divers Reſtrictions, and under certain Rules in our Law-Books.

It hath been often Reſolv'd, that the Lords cannot proceed upon any Writ of Error, till firſt the King hath Sign'd a Petition for the Allowance of a Writ of Error to be ſued out.

As in the Year-book of 22 *Edward* the 3*d. Fol.* 3. It is there held, that a Writ of Error in Parliament lies not, till the King be petition'd for it, and till the King have Sign'd the Petition. Which Signing is indeed the Commiſſion which gives the Authority.

Hadelow's Caſe. And in the caſe of *Edward Hadelow*, where Judgment was given for the King: Upon the King's Signing a Petition for a Writ of Error, and the Writ ſued out, the Roll in which the Judgment was entred, was brought by Sir *William Thorp*, Chief-Juſtice of the King's-Bench, into the Parliament: Upon which the King aſſign'd certain Earls and Barons, and with them the *Juſtices*, to hear and determine the buſineſs: And before it was determin'd, the Parliament was ended; yet the Commiſſioners ſate ſtill, but the King was gone.

And it was urged before the Delegates (for ſo they are called) That the Judgment could not be Revers'd, except in Parliament; and there it is ſaid, that the King hath no Peer in his Land, and that they cannot judge the King.

How came that in to Debate? Why it was in the Caſe of an Outlawry, which is always for the King's benefit; and where the King is concern'd, the Lords have no Juriſdiction without the King's allowance; and the King doth not think fit to refer it to the whole Houſe of Lords; yet the King will have Juſtice done, and he will be inform'd if the Outlawry were duly ſued out. But the King himſelf aſſigns the perſons that ſhall judge of it; And yet it is ſaid, that this is ſuing Error in Parliament; for when the Parliament is riſen, it is held that the Delegates appointed by the King could not proceed: So that Pleas may be held in Parliament by the King and his Council, ſuch as he ſhall ſpecially appoint for that purpoſe at every Parliament.

And

And yet they may be ſtiled *Placita Parliamentaria*, being tranſacted only in time of Parliament, but not by the Parliament.

This caſe of *Edward Hadelow* teaches the true nature and courſe of a Writ of Error in Parliament, and the right method of proceeding upon it, and the King's Prerogative in it: And how that caſe wherein the King is any way concern'd in intereſt, (as he is in caſes of Outlawry) ſhall be Examin'd by none but ſuch as are ſpecially aſſign'd by the King.

See the caſe in the Year-Book of 1^mo *Hen.* the *7th. Fol.* 19. *Flourdew's* caſe.

By Advice of all the Judges in the Exchequer-Chamber, which is a caſe Reported in *Latin*;

Oportet partem habere billam de Rege indorſatam: Et ſuper hoc Cancellarius faciet breve de Errore; Et tunc capitalis Juſticiarius de banco Regis; (ſo that it is only from the Court of King's-Bench, but no other Court) *Secum adducet in Parliamento breve de Errore, Et prædictam billam ſic indorſatam.* And the Clerk of the Parliament is to have the keeping of the Bill Endors'd; This proves that it is their Commiſſion by which they proceed, and it muſt remain with the Clerk of the Parliament, not with the Chancellor.

The Lord *Dyer's* Reports, 23. *Eliz. Fol.* 375. *tit. Error. Plac.* 19. there is a Supplication Sign'd by the Queen, for a Writ of Error.

We have another Precedent in Sir *Francis More's* Reports. *Fol.* 834. in the caſe of *Heydon* and *Sheppard. paſc.* 12. *Jac.* 1^mi. The like in *Leonard's* Reports the 3*d.* part. *Fol.* 160. in the caſe of the Queen and *Hurlſton.*

Now concerning Proceedings in Equity in general, the *Engliſh* Court of Chancery, (the Court of Equity there) it hath not been of any great Antiquity, and upon what Legal Foundation it ſtands, is not eaſily to be affirm'd: As I have made appear in a larger Treatiſe, *Of the Original of the Juriſdiction of the Chancery in matters of Equity*; To which I refer my Reader.

Our Ancient Authors, as the *Mirror* of *Juſtices*, *Glanvil*, *Bracton*, *Briton*, and *Fleta*, although they treat of the Chancery, as it proceeds according to the Rules of the Common-Law, *viz.* in Repealing of Patents, and in Caſes Priviledg'd, yet none of them do once mention the Court of Equity there; and yet their undertakings were to treat of all the ſeveral Courts then in being, which proves the Court of Equity in Chancery was not then in being.

It hath been adjudg'd, 26. and 27. *Eliz.* in the King's-Bench in *Perrot's*, and in *Marmaduke Langdales Caſe. Cok.* 12. *Rep. Fol.* 52. That a Court of Equity cannot be Erected by Patent, but only by Act of Parliament, or by Preſcription.

And the Chancery hath no Preſcription for a Court of Equity, as appears by thoſe Ancient Authors.

If the Chancery it ſelf have no Right of Preſcription, then there is no Foundation for any Preſcription in Caſes of Appeals; nor is there any Act of Parliament that gives it.

The Firſt Decree (as I take it) in Chancery, is but of the time of King *Richard* the *Second*; and that was Revers'd, for that it was in a matter properly determinable at the Common-Law.

The beſt proofs of the Power and Juriſdiction of a Court are the Records and Precedents of a Court: And if it be by Preſcription, it muſt appear by ancient and frequent Precedents. *Plowd. Comment.* in the caſe of the Mines. *Fol.* 301. *b.*

And if any Court Uſurp a Juriſdiction in a caſe where it appears in their

very Proceedings themſelves, that it hath no lawful Juriſdiction; what they do in ſuch caſe is *Coràm non Judice*, and is utterly void.

Now concerning the Exerciſe of a Juriſdiction by way of Appeal from a Court of Equity for Error in their Decrees, I ſhall make mention of the very Records, and Acts of the Houſe of Lords.

I have ſearch'd into the Journal of the Lords, and I find a Record or Entry there of the Parliament held 18 *Jac.* 1. *Anno* 1621. And we need ſearch no higher, for that gives a full account of all the times then paſs'd, as to the point in hand, *viz.* Of the Supreme Judicature and Juriſdiction.

18 *Jac.* 1. *Fol.* 175. Of the Lord's Journal, I find by an Entry of the 30*th* of *November* in that year, That a Comittee had been named by the Lords to take into conſideration the Cuſtoms and Privileges of the Lord's Houſe, and the Privileges of the Peers, or Lords of Parliament.

And that a Sub-Committee had been named, who had expreſs power to reward ſuch perſon as by their Warrant ſhould ſearch among the Records for Privileges and Cuſtoms; and that Mr. *Selden* had been appointed for that purpoſe, and had taken much pains in it.

I obſerve by the way, That the Houſe of Lords were not then of the ſame Judgment with the Noble Author I have before mentioned, who aſſerts the Right of Judicature of the Houſe of Peers to be by the very firſt Conſtitution of the Government, Univerſal, and in all Cauſes whatſoever, unleſs reſtrain'd by ſome Act of Parliament.

Had that been true, there had been no need to ſearch for Precedents to warrant their Proceedings in any caſe. It had been ſufficient to juſtify the Proceedings, if no Act of Parliament could be found to reſtrain them in any ſuch caſe; the labour of which would have been properly on his part that would preſume to diſpute their Juriſdiction.

No, the Lords took the right courſe to examine it; if there were no Precedents, the Lords concluded that then they had no Right to a Juriſdiction; and no Perſons, nor Court, can aſſume to themſelves at their own will, any Authority or Juriſdiction; *Quis me conſtituit Judicem?* ſaid our Bleſſed Saviour, there muſt be a conſtitution of it. And it was properly enough ask'd by the *Scribes* and *Phariſees* of our Saviour, *Who gave thee this Authority?*

I would obſerve too, that the Sub-Committee of the Lords employ'd for that purpoſe, (of ſearching for Precedents) a perſon, who was in his Element, (the Famous *Selden*); no Record could eſcape his diſcovery

Further in the 208*th* Folio of that Journal of the 18*th* year of King *James*, on the 14*th* of *December*, the then Archbiſhop of *Canterbury* (for he, it ſeems, took ſpecial care of it) mentions in his Report to the Lords the Proceedings of that Committee, *viz.* A Collection made of Cuſtoms and Orders of the Lord's Houſe, and of their Privileges made out of Records: And he preſented that Collection to the Houſe, and deſir'd it might be preſerv'd as a Memorial whereunto men may reſort as occaſion ſhould require, and make uſe of it. It was thereupon ordered by the Houſe, to be delivered to the Clerk to be kept for that purpoſe.

So that this was intended by the whole Houſe of Lords to be a Standard, whereby to meaſure and judge of their Juriſdiction and Privileges for the future.

I find the Title of that Committee, *Fol.* 91. to be, *A Committee for ſearching for* Precedents for Judicature, *Accuſations and Judgments*, anciently uſed *in this High-Court of Parliament.*

This

This ſhows, it muſt be an ancient Uſage or nothing. Therefore late and modern Uſage and Precedents, are, in the Judgment of the Lords, of no great Weight, to Entitle them to a Juriſdiction.

Moreover, *Fol.* 105. of that Journal, there is an Order made, 27. *Mar.* 1621. for Collection of Money among the Peers to pay the Charge for ſearching for Records in the Tower, and elſewhere, and to have Copies of them certifi'd under the Officer's hands. Every Earl and Viſcount was to pay Forty Shillings, and every Biſhop and Baron Twenty Shillings.

I have perus'd that Book, Entitled, *A Collection of Privileges or ſpecial Rights, belonging to the Baronage of* England.

What is meant by that Title, appears by the Table to the Book, which conſiſts of theſe Heads following, *viz.*

1ſt Judgments { *Of Offences Capital.* Fol. 11. *b.* / *Of Offences not Capital.* Fol. 25. / *Upon Writs of Error in Parliament.* Fol. 88.

Another Head, is, The Lords appointing Judges out of themſelves, for Examination of Judgments in other Courts, *Fol.* 95.

I thought this laſt Head, or Title, might afford ſomething to our purpoſe, relating to Appeals.

Under this Head there is nothing mention'd but concerning Erroneous Judgments given in the Court of King's-Bench at *Weſtminſter*, or upon the Statute of 27 *Elizabeth*, *Cap.* 8. Of Judgments given in the Exchequer-Chamber, by the Judges of the Common-pleas, and the Barons of the Exchequer, upon Error to Examine Judgments given in the King's-Bench; from whence Error lies alſo before the Lords, by the expreſs words of that Statute; which no doubt is therefore a very Legal Power and Juriſdiction in the Lords, being Exercis'd in the method directed by Law, as before is obſerv'd.

The Book of this Collection expreſly takes notice, That no Writ of Error lies in Parliament upon a Judgment given in the Court of Common-Pleas, till that Judgment have been Revers'd, or Affirm'd in the King's-Bench. As it was anſwer'd in Parliament, in the Caſe of the Biſhop of *Norwich*. *Rot. Parl.* 50. *E.* 3. *Articl.* 48.

The like Reſolution did the Lords give after Hearing all the Judges, and long Conſultation, and a referring the Conſideration of that matter to a numerous Committee of the Lords, in a Caſe of the late Earl of *Macclesfeld*; wherein that Earl was Plaintiff in the Exchequer, in an Action of *Slander*, and Judgment there in that Court given againſt him; whereupon the ſaid Earl (ſince this laſt Revolution) ſued Error before the Lords, paſſing by the method directed by the *Stat.* of 31. *E.* 3. *Cap.* 12. for Suing Error upon Judgments given in the Exchequer; And the Lords were upon the very point of Reverſing that Judgment in the Exchequer; but being by one of the ſaid Judges then alſo ſitting on the Upper Wooll-ſack, put in mind of that Stat. of *E.* 3. they did forbear to proceed to do any more upon it, referring it to the Order limited by that Statute.

This proves, That the Lords are tied to a method too, in caſes where they have a Rightful Juriſdiction: They muſt not take it *ad primam Inſtantiam*, nor *per Saltum*.

In that Collection I have mentioned, under that *Lemma* of *Examination of Judgments in other Courts* (which is comprehenſive enough) I find notice taken of

of *Hadelow*'s Caſe. 22. *E.* 3. *Fol.* 3. and *Flourdew*'s Caſe, 1 *H.* 7. *Fol.* 20. which I cited before at large. And theſe concern only Caſes of Erroneous Judgments in the *King's-Bench.*

Under the Title of *Offences not Capital*, there is mention of no caſe but upon Accuſations for Criminal Cauſes.

It begins with *William Latimer*'s Accuſation of *John at Lee* for Offences againſt the State.

It mentions the Caſe of *Richard Lyons*, for procuring of Patents for private advantage, and of the new Impoſitions without Parliament.

It inſtances in the Caſe of *William* Lord *Latimer* accus'd by the Commons, And the Caſe of *Alice Peirſe.*

And the Caſe in 7 *Richard* the 2*d num.* 11. of *Michael de-la-Pool*, Chancellor of *England*, accus'd by *John Cavendiſh* of *London*, Fiſhmonger, for Bribery.

And the Earl of *Northumberland*'s Caſe, 5 *H.* 4. *num.* 26. and *Thorpe*'s Caſe; but they are all in Criminal Cauſes.

While this Committee was in being, I meet with an Appeal made to the Lords from a Decree made in Chancery: And (as I take it,) 'tis a decree made by the Lord *Bacon* (though he is not named by his name) it is *Fol.* 181. in the Journal of the Parliament, 18. *Jac.* 1621.

The Third of *December* in that Parliament, Sir *John Bourchier* by Petition Appeals to the Lords from a Decree in Chancery, wherein he himſelf was Plaintiff againſt *John Mompeſſom* and others, and there were croſs Suits, and they were about Accounts between them. And Sir *John Bourchier* had a Sum of Money decreed to him, but not for ſo much as he thought was due; and therefore he Appealed, and complain'd in his Petition to the Lords, of an *haſty Hearing* of his Cauſe in Chancery, and that his Witneſſes were not heard, and uſes the very formal word of *Appeal* in his Petition.

Fol. 188. 6. *December*, It was referr'd to the Lords Committees for Priviledges, to conſider whether it were a formal Appeal, or not.

I muſt confeſs, it doth not clearly appear to me, what the true meaning, or ground of that Order is; for (as I now ſaid) the Petition does expreſly uſe the word (*Appeal.*)

The 10*th* of *December Fol.* 196. The Lord Archbiſhop of *Canterbury* Reported, That divers Lords Sub-Committees appointed to ſearch for Precedents, cannot find that the word (*Appeal*) is uſual in any Petition for any matter brought before them. This deſerves to be noted.

So that it ſeems the Lords Committees underſtood the meaning of their Order to be, to ſearch for *Precedents* (if there had been any) where the Lords had uſed in former times to admit of, and to receive Appeals before them, againſt Decrees made in Chancery, or in any Court of Equity.

Note. The Archbiſhop further Reports, That they could not find ſo much as the word (*Appeal*) uſed in any Petition; and that it muſt have been by way of Petition, if any way. This ſhows the Novelty of it; for he likewiſe reports, That all matters complain'd of before the Lords muſt be by [redacted] Petition, and in no other Form.

Note. And that the Ancient accuſtom'd Form of the Petitions muſt be (*To the King and his Great Council*;) this is very obſervable.

Note here, That the Direction and Entitling of Petitions to *the Lords Spiritual and Temporal in Parliament Aſſembled*, omitting and leaving out the

King

King in the Direction (as it is now uſed, and hath been ever ſince King *Charles* the *Firſt* went away from the two Houſes in 1641.) is not according to Ancient Form and Cuſtom.

And that the Ancient accuſtom'd Form was not to the Lords, by the Title of the Lords Spiritual and Temporal aſſembled in Parliament, as now uſed, but to *the Great Council.*

Whom that great Council did conſiſt of, and by whom Nominated and Conſtituted, I have made ſome conjecture, by what I have before in this Treatiſe diſcours'd of, concerning that *Magnum Concilium in Parliamento*; and concerning the ancient and conſtant uſage till of late years, and until the ſeparation between the ſaid King *Charles*, and the *Parliament*, of the King's appointing *Triers of Petitions* in every Parliament. Let the Reader take occaſion here to look back upon what I have herein already diſcours'd upon this Subject, which may give light to this matter.

In the laſt place, the Archbiſhop reports, That they could find but only one Precedent of this nature; which was a complaint by Petition againſt *Michael de-la-Poole* (Lord Chancellor) *for matters of Corruption.*

Which Precedent I have mention'd before; for *Michael de-la-Poole*, Lord Chancellor, was accus'd in the Seventh year of King *Richard* the *Second*, by *John Cavendiſh* of *London* Fiſhmonger, for Bribery.

I preſume too, according to the uſual Form of Petitions, (as the Archbiſhop reports them to be) that this Petition was directed *to the King and his Great Council*, and not *to the Lords*, &c. *aſſembled in Parliament.*

But I conceive this only Precedent (as the Archbiſhop calls it) is no Precedent of the ſame nature, (as hath been ſo frequently uſed of late, and ſtill is) for an Appeal againſt a Decree meerly for Error in Judgment.

For to Err in Judgment in making a Decree, and for the Judge that makes the Decree, to receive a Bribe in the caſe, are two different things; for to Err in Judgment (as *Humanum eſt Errare*) is of a meer civil Nature; but to be corrupt, and take a Bribe, though the Decree be juſt, is of a Criminal Nature; and therefore not to the purpoſe of what we are diſcourſing.

And there are about 240 years diſtance in time, between this only Precedent, and the time of this ſearch made by the Committee of Lords, *viz.* 18 *Jac.* 1. (a large *Caſma* in a uſage and cuſtom for the Exerciſe of a Juriſdiction.

And the matter in hand muſt ſtill be determin'd by Precedent and Cuſtom. *Conſuetudo Parliamenti eſt Lex Parliamenti*, is the old Rule.

This complaint by Sir *John Bourchier* was in a matter, not of Error in Judgment, for then that Error muſt in particular have been aſſign'd, and the Judge not have been reflected upon; but the complaint is of a Male-adminiſtration in the Judge (an haſty Hearing, and Witneſſes not heard.) And therefore the Lords in that caſe cenſure the Petitioner for caſting a ſcandal upon the Judge. For the Lords Examin'd the matter, and found the ſuggeſtion of the Petition to be falſe. The Cauſe had had a deliberate Hearing, and the Petitioner's Witneſſes had been heard; yet the Petitioner for the ſcandal had but an eaſy pennance, and that was remitted wholly, *viz.* to acknowledge this offence.

But note this was a proceeding againſt him upon his own Petition: He himſelf Entitled the Lords in this caſe to a Juriſdiction. It doth not appear that any Adverſe party was Summon'd to defend it, the Lord-Keeper himſelf defended it upon the point of ſcandal.

There is yet another moſt Memorable Caſe in the very Journal of the Lords too, and that is Four years after. *viz.* 22. *Jac.* 1. which is as followeth; and it comes ſtrongly home to the point in hand, *viz.* of *Appeals.*

An. Dom. 1624. 28. *May* 22. *Jac.* 1. *William Matthews* petitioned againſt *George Matthews*, by way of Appeal, in the Houſe of Lords, and queſtion'd a Decree made by the Lord-Keeper in Chancery on the Defendant's behalf, from which Decree *William Matthews* Appeal'd.

It is to be found in the Journal of the Lords. 28. *May* 22. *Jac.* 1.

The Lords Committees, who were appointed by the whole Houſe to Examine the Cauſe, Heard Council on both ſides ſeveral days, and Reported to the Houſe their Opinion for the Petitioner and Appellant.

Thereupon the Reſpondent, *George Matthews*, petitioned the Lord's Houſe againſt that Report, and Opinion of the Committee; and in his Petition alledges, That he was inform'd by his Council, *That it had been the courſe of the Houſe to Reverſe Decrees only by Bill legally Exhibited*; that is, by a Bill to paſs into an Act by Parliament; (for what can a Bill in that caſe otherwiſe ſignify?) This ſhows, that the whole Parliament are the proper Judges of it.

The Lord's Houſe hereupon being tender and cautious how they entertain'd a new Juriſdiction, name another Committee of Lords, to ſet down an Order in that Cauſe.

That Committee Report their Order, *viz.* That the Cauſe be Review'd in Chancery by the Lord-Keeper, by ſuch Lords as the Lords Houſe ſhould name, and by any Two of the Judges, as the Lord-Keeper ſhould name,

For which end the Lord-Keeper is to be an humble Suitor to the King from the Houſe, to grant a *Commiſſion* to himſelf (the Lord-Keeper) and the Lords to be named by the Houſe.

The Lords Houſe approv'd of the Order, and named Seven Lords. The King granted the *Commiſſion* accordingly, and the Decree in Chancery was Revers'd upon it.

The Orders are to be ſeen in the Regiſter's Office of the Chancery. *Mich.* and *Hill.* 22. *Jac.* 1.

Note. This is a diſcharging all that the Lords had before done in it; though they had in effect arriv'd at the very Port, and made a concluſive Order and Decree.

But after all, refer it to the right and uſual Method in the main of it, *viz.* to be determin'd by *a Commiſſion* from the King to the Lord-Keeper himſelf, to Salve his Honour in it, (*Quod in conſultò fecimus, conſultò revocemus*) and to ſome Judges (who are the moſt proper) and to the Lords, who for that purpoſe were recommended by the Houſe of Lords, (which is in compliance with their deſire, but not *ſtricti Juris.*)

But the King's Commiſſion is the true, regular, and warrantable ground and foundation of all the further Proceedings in that Caſe.

And all this by the Direction, and with the Opinion and Judgment of the Lords themſelves, in a Caſe wherein they had begun, and made a large progreſs in the Exerciſe of a Juriſdiction, and then wholly deſiſted. Nor

Nor is the Subject without a proper and ordinary remedy (if our Law-Books may be credited) where he is grieved by an Erroneous Decree in a Court of Equity.

See Serjeant *Rolles*'s Reports the 1*ſt* Part, *Fol.* 331. the Caſe of *Vaudrey* againſt *Pannel*. Sir *Edward Coke* cites a Caſe there, *Mich.* 43. *Eliz.* in the Chancery between the Counteſs of *Southampton*, and the Lord of *Worceſter*, Reſolv'd by all the Judges, That when a Decree is made in Chancery, the Queen upon a Petition may referr it to the Judges, (but not to any other;) and ſo (ſays that caſe) the practice and proceedings have been; which make a Law in caſes of Equity, and the Lord Chancellor agreed to it, (the Lord *Egerton*) and accordingly upon Petition to the Queen, and a Reference by the Queen to the Judges, that Decree was Revers'd.

The like we may read in *Anderſon*'s Second Reports, *Fol.* 163. The Earl of *Worceſter*, and Sir *Moil Finche*'s Caſe, the ſame with that of the Counteſs of *Southampton*, and *Bulſtrode*'s Third Part, *Fol.* 118. See Serjeant *Rolles*'s Abridgment, the Firſt Part, *Fol.* 382. *Ruſwell*, and *Every*'s Caſe. 15 *Jac.* 1. and *Arden* and *Darcy*'s Caſe, 8 *Jac.* 1. 27 *H.* 8. *Fol.* 15.

But as to the Remedy againſt an Erroneous Decreee in Chancery, I have already given my advice at large in that former Treatiſe of mine beforemention'd, to which I refer my Reader. It is high time that it ſhould be ſettled in ſome conſtant courſe.

The Noble Author, ſuppos'd (as I ſaid before) to be the late Lord *Hollis*, in his Book beforemention'd, hath aſſerted a very large Juriſdiction to belong to the Houſe of Peers, which in the conſequence, if it be obſerv'd and put in practice, will be of mighty concernment to the Subjects: Nor hath it been anſwer'd, or taken notice of by any, as far as I have heard.

That Author aſcribes to the Lords a power to try, and determine a matter of Fact in iſſue, although the Right of a Freehold depend upon it; and this by Proofs without a Jury, *pag.* 66. and this he grounds upon the Precedent of the caſe of *William Paynel*, the Record whereof is in *Ryley*'s *Placita Parliamentaria*, *Fol.* 231. What then becomes of that great privilege of the people of *England*, of being tried by the Country, and by their Neighbours; and inferior Courts of Equity will be very apt to tread in their ſteps, and do the like; and it deſerves to be enquir'd into, if it be not already frequently ſo done.

The Lords will not be likely to reform it upon Appeal from theſe Courts of Equity, if that ſhould be aſſign'd for Error, if they themſelves ſhould practice it, as this Author ſays they may.

Nor does that Precedent of *William Paynell* any way countenance that practice; for there the (*Concilium Regis*) gave Judgment upon Matter of Fact confeſs'd, where there needed no trial at all.

The ſame Noble Author affirms, That the Lords may entertain or diſmiſs Cauſes as their occaſions will give them leave, or as they have leiſure from the greater affairs of the Kingdom; ſo that ſometimes they cannot be at leiſure to do Juſtice: If this Opinion be allow'd, *Ceſſa regnare*, ſays the Petitioner to King *Philip* of *Macedon*, when that King refus'd to anſwer her Petition for want of leiſure.

The Lords can (ſays the ſame Author) grant a temporary diſmiſſion to a Defendant, by an Entry made of *Eat inde ſine die ad præſens*: but may Summon him again for the ſame Cauſe at another time when they think fit: If

this

this be true, a man ſhall never know when his Cauſe is at an end; nay, the Chancery will give further coſts after the Parties and Cauſe are out of the Court, and long after the whole matter is at end, without any new proceſs.

The perſons of whom this high Judicature doth conſiſt had need be men of great Learning in the Law, and of long Experience: For the matters that ſhould come before them are ſuch, as are too difficult for the inferior Courts to determine, and are very abſtruſe; and yet thoſe inferior Courts are generally furniſh'd with ſuch as are of great Abilities, and long Experience, and uſually ſpend Thirty or Forty years in hard ſtudy, to make them fit for the diſcharge of their Offices.

Be Learned ye that are Judges of the Earth, ſays Almighty God, that Judge of Judges. Hence Governors are wont to be called Senators, and in the time of the *Saxons* they were called Eoldermen or Eldermen, for their Age, Gravity, and Experience.

It would indeed be a Miracle in Nature, if any one could truly affirm of himſelf, *Me jam jam à puero, illicò naſci Senem*, or *naſci Judicem* to be able to judge in thoſe abſtruſe and difficult Cauſes.

St. *Paul* being accus'd before *Fælix*, did (and that without inſinuating flattery) tell his Judge, That he did the more cheerfully anſwer for himſelf, becauſe *Fælix* had been (as St. *Paul* acknowledg'd) of many years a Judge unto that Nation: And he ſaid the like when he ſtood before King *Agrippa*, becauſe he knew him Expert. And it is a juſt and commendable courſe, always practis'd in all our inferior Courts, That after a Cauſe hath been pleaded, that both Parties, and Council, and Witneſſes, and all others that will, are permitted to be preſent, and to hear the Repeating, and opening, and true ſtating the Caſe by the Bench, and Court, and to hear the Debate of it, to obſerve, and be in a readineſs to rectify any miſapprehenſion, or miſtake (if any happen) and ſo to ſet the Court right again.

As alſo, that the grounds and reaſons of the Opinions of the Judges may be known, that the People may the better know thereafter how to ſquare their actions: And that the Law may be the better known to thoſe that are ſubject to it. For there ought to be one certain known Rule of Law, whereby one and the ſame Caſe is to be determined, and not two or more contradictory Laws in one and the ſame place.

It was a woful condition, when at the ſame time ſome were burnt in *Smithfield* for being Proteſtants, and others for being Papiſts; which made one cry out, *Bone Deus, quomodo hic vivunt!* &c. Inferior Courts, and the Superior muſt judge by the ſame Law and Rule; for *Miſera eſt ſervitus, ubi jus eſt vagum.* And it is impoſſible to ſerve two contrary Maſters; and it is a ſad caſe, where the Trumpet of the Law gives an uncertain ſound, for then a man knows not how to order his affairs.

There may indeed be a different Method, and Courſe of Proceedings in the ſeveral Courts, and yet all conform to the ſame Law. And it is ſometimes ſaid by our Judges, that what is Law in the Exchequer is Law alſo in the King's-Bench, and Common-Pleas. If it were otherwiſe, great Confuſion would ariſe. And this Law is not known by Inſpiration, it is not infus'd all at once, but acquir'd by long Study, and long Experience.

Sir *Francis Bacon*, in his Advancement of Learning, *pag.* 445. holds it juſt, that Judges ſhould alledge the reaſons of their Sentence, and that openly in the Audience of all the Court.

And anciently amongſt us in *England*, the Courts uſed to enter the reaſons given by the Judges, upon the Record of the Judgment; which is now ſuppli'd in ſome meaſure, by Reports of Caſes adjudg'd, and of the Arguments at Bar, and at Bench.

But we have few or no Reports of Caſes adjudg'd in the Supreme Court, ſince thoſe that are printed by Mr. *Ryley*.

In that ancient Cauſe of *Adelwold*, Biſhop of *Wincheſter* in the *Saxon* times under King *Eldred*, the Record mentions, that the Biſhop himſelf, *Coram cunctis ſuam cauſam patefecit.* He pleaded his Cauſe himſelf.

Qua Rebenè, & ritè, ac Apertè, ab Omnibus diſcuſſa, (it was openly debated) *Omnes reddiderunt Judicium.* This was at the *Miccel-Gemot*, there was no withdrawing.

And *Eadmerus* gives us the like Inſtance in the Cauſe of *Lanfrank* Archbiſhop of *Canterbury* in the time of King *William* the *Firſt*; 'tis in his *Hiſtoriæ Novorum*, pag. 9. *Adunatis* (ſays he) *Primoribus & Probis viris de Comitatibus: querelæ Lanfranci in Medium ducerentur, examinarentur & determinarentur. In medium*, that is, before, or in the midſt of all that vaſt Company.

To Conclude, and in order to the obtaining a ſafe and ſpeedy remedy, let our Law-makers be mindful of that old Advice and Caution, *viz.*

——— ——— ———*Serò Medecina paratur*
Cum Mala per longas invaluêre moras.

FINIS.